Jason Chan Huan Seng & Ors v Public Prosecutor and other appeals

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NOS P-09–182–07 OF 2013, P-09–183–07 OF 2013, P-09–184–07 OF 2013 AND P-09–185–07 OF 2013
ZAHARAH IBRAHIM, AZAHAR MOHAMED, ABDUL AZIZ AB RAHIM, ABANG ISKANDAR AND UMI KALTHUM JJCA
5 SEPTEMBER 2014

Criminal Procedure — Seizure of properties — Seizure of properties by police — Claim for return of properties seized by owners — Order of forfeiture — Appeal against — Whether properties were illegal — Whether lower courts had wrongly applied presumption of illegal property under s 35 of the Dangerous Drugs (Forfeiture of Properties) Act 1988 ('the Act') — Whether presumption under s 35 applied to proceedings under s 32(3) of the Act — Stare decisis — Conflicting decisions — Whether exception to rule of stare decisis applied — Whether appellants had succeeded in proving that properties were not illegal properties — Whether proven that appellants were lawfully entitled to properties

Chan Kong Chuan ('the fourth appellant') was arrested for trafficking in dangerous drugs, an offence under s 39B of the Dangerous Drugs Act 1952. Following the arrest the police carried out an investigation that led to the seizure of certain properties belonging to the four appellants under s 25(1) of the Dangerous Drugs (Forfeiture of Properties) Act 1988 ('the Act') on the grounds that that these properties were illegal properties obtained through prohibited or illegal activities. The seized properties consisted of cash held in bank accounts, various unit trusts as well as several landed properties such as apartments, with a total value of about RM3.5m. Subsequent to the seizure, the police issued and served separate notices in writing of such seizure and the grounds thereof to the appellants as owners of the properties. The appellants then applied under s 32(3) of the Act for the release of the seized property to them on the grounds that they were lawfully entitled to those properties. In accordance with the requirements of s 32 of the Act, the public prosecutor referred the appellants' claim to the sessions court for decision. The sessions court judge held that the respondents had failed to rebut the presumptions under s 35 of the Act to entitle the release of the properties to them. Accordingly, he ordered the seized properties to be forfeited. The appellants' appeal against the sessions court's order of forfeiture was dismissed by the High Court judge, who ruled that the presumption under s 35 of the Act applied to proceedings under s 32(3) of the Act. This was the appellants' appeal against that order. In this appeal the appellants argued that s 35 of the Act that provides for presumptions ought not to apply in the context of proceedings under s

32(3) of the Act. In support, the appellants relied on the Court of Appeal's decision in the case of *Public Prosecutor v Lim Kim Hoei & Anor* [2014] 3 MLJ 534 (*Lim Kim Hoei*'s case'). The position advocated by the prosecution, on the other hand, had been that the presumptions under s 35 of the Act should be applicable to all proceedings under the Act. The prosecution had submitted that the Court of Appeal in *Lim Kim Hoei*'s case had erred in law in arriving at its decision in concluding as it did, namely that the presumption of illegal property ought not to apply to the seized property that was the subject matter of a claim by a person/claimant under s 32(3) of the Act. Instead, the prosecution contended that the Court of Appeal's decision in the case of *Cherian a/l KC George & Anor v Public Prosecutor* [2012] 4 MLJ 537 (*Cherian*'s case) ought to be the preferred view on what is the law on the matter presently under scrutiny. It was the prosecution's case that the phrase 'any proceedings' in s 35 of the Act ought to include a proceeding under s 32(3) of the FOP Act and that the decision in *Lim Kim Hoei*'s case did not promote the purpose or object of the Act as opposed to the decision in *Cherian*'s case. In the present case, which involved the appellants' claim for the return of the properties seized by the police pursuant to s 25(1) of the Act, this court had the opportunity to - the issue as to whether the claimants, in the course of proving their claim over the property under s 32(3) of the Act would also have to rebut the presumption of 'illegal property' which resides under s 35 of the Act and to resolve the two conflicting decisions.

Held:

(1) The provisions of s 32 of the Act allow any person to stake a claim over a property that was seized by the police within three months of its seizure. There is no clear intention in the wording of s 32(3) of the Act that in order to prove that the property is lawfully his, the claimant was also required to prove a negative, in that the property is not illegal property. The gist of the matter is that as a claimant, he would have to prove his claim on the balance of probabilities, just like any person in a civil case who wants judgment to be entered in his favour by the court. That burden is shouldered by the claimant under s 32(3) of the Act not because the presumption under s 35 applies to the proceeding under s 32(3), but because he has to prove his case in order that the court is satisfied and gives judgment in his favour (see paras 60 & 73–74).

(2) All the provisions in the Act should be considered by having due regard to the other provisions housed in the same statute, and should be interpreted harmoniously so as to maintain the integrity of its framework, by giving effect to what Parliament had intended to provide for in the various regimes created within the Act. It was apparent that the Dangerous Drugs (Forfeiture of Properties) Act 1988 ('the Act') has created three separate regimes where separate set procedures are provided for each one of them, namely the prosecution of offences regime, the

forfeiture of illegal properties regime, and the proceedings that are being housed under s 32(3) pertaining to the claim by a person over a property which he claims to be its lawful owner. Taken in that sense, ss 35 and 32(3) of the Act are, in fact and in law, mutually exclusive. Such a conclusion is fortified by s 2 of the Act, which contains the qualification 'unless the context otherwise requires'. Applying s 35 of the Act wholesale to s 32(3) would militate, against the clear words of s 35 where clearly the context of s 35 deals with proceedings 'against any person or in respect of any property on the ground that such person is a liable person or that such property is illegal property' by the prosecution. In the circumstances s 35 of the Act should not apply in proceedings where a person claims for the return of property, which he claims to be lawfully his. As such, a proceeding under s 32(3) of the Act is not a proceeding that is envisaged under s 35 of the Act and would not be in tandem with the intention of law makers and would be in violation to the clear wordings of s 35 of the Act. For these reasons the presumption of illegal property under s 35 would not apply in a proceeding under s 32(3) of the Act (see paras 65–66 & 70–71).

(3) In *Lim Kim Hoei*'s case, which is the latest Court of Appeal decision that ruled on the inter-play of these 2 sections under the Act, the Court of Appeal addressed the *Cherian*'s case and came to the conclusion that had 'the issues and the case law authorities been fully ventilated before the panel in *Cherian*'s case, the panel then would probably have come to a different conclusion'. The present case sought to resolve the apparent conflict that existed pursuant to the two decisions emanating from this court, namely *Cherian*'s case and *Lim Kim Hoei*'s case. As a court of coordinate jurisdiction, this court was at liberty to choose which of the conflicting decisions to follow regardless of their relative age. This was one of the three exceptions to the general rule that the Court of Appeal is bound by its own decisions, and forms an integral part of the larger and crucial principle of stare decisis. In the circumstances, it was clear that the decision of this court in *Lim Kim Hoei*'s case was the preferred view because, as was alluded to above, it was the proper and correct view of the law in determining whether the presumption of illegal property should apply in a proceeding under s 32(3) of the Act. It is clear that there was no ambiguity in the language employed under s 35 of the Act and that the section meant what it said (see paras 77–78).

(4) As the Act is a special law enacted under art 149 of the Federal Constitution, which makes forfeiture of private property and its vesting in the government valid despite the fundamental rights provided for in art 13, it has to be interpreted such that the legitimate and recognised rights of persons such as those provided for under s 32(3) of the Act were not compromised. The integrity of the Legislative framework with its various regimes had to be maintained. In that sense the provisions had to

be interpreted in such a manner as to create and maintain harmony in the inter-play between its various provisions, inter se. As such, it was clear that the presumption of illegality against the property did not apply against a seized property which a claimant sought to be released to him under s 32(3) of the Act, as being the lawful owner of that property. Proceedings under s 32(3) come under a specific regime under the Act to which the presumption of illegal property under s 35 did not apply (see paras 82–83).

(5) In determining whether the appellants had succeeded in proving that the properties were not illegal properties and that they were lawfully entitled to the properties it was necessary to examine the evidence adduced by the appellants. In this regard it was noted that the sessions court judge had completely ignored the income earned by the third and fourth appellants from the time they began their respective employment until 1992, ie a period of 17 and 16 years respectively, on the basis that most of the properties were purchased since 1995. Further, the sessions court judge had completely ignored the evidence that the third appellant had received loss of employment cash payment of RM38,172.50 and that in 1997 he was paid the sum of RM45,000 by Great Eastern Life Insurance Co for a matured policy. There was no reason why that evidence should be ignored or rejected, especially since there was no challenge by the prosecution. In addition, the sessions court had also completely ignored the gains that could be reasonably be obtained by the appellants through shrewd and careful investments of their employment income and their other legitimate sources of income. There was sufficient evidence adduced before the sessions court for it to release the two moveable properties to the appellants. There was nothing inherently improbable in the explanation given by the appellants as to how they were able to financially manage to acquire the two apartments. In the absence of any evidence to the contrary, the sessions court and the High Court ought to have found that the appellants had succeeded in proving, on the balance of probabilities, that the two moveable properties were not illegal properties and that they were lawfully entitled to the same (see paras 88–89, 93–95 & 106).

(6) The appellants had adduced sufficient evidence to prove that the monies in the bank accounts and the unit trusts belonged to them. In the circumstances, the sessions court judge and the High Court judge erred in not finding that the appellants had proved, on the balance of probabilities that the money in the bank accounts was not illegal property and that the appellants were lawfully entitled to the money (see paras 116–117, 122 & 138–139).

(7) (per **Azahar Mohamed JCA**, dissenting)The doctrine of stare decisis, a fundamental rule of common law, ought to be treated with utmost

deference. In the circumstances *Cherian*'s case, which accurately promoted the purpose or object as embodied and expressly stated in the Act, should be preferred given that it is a decision not made per incuriam. The decision in *Cherian*'s case was therefore binding on this court and the courts below (see paras 6–8).

(8) (per **Azahar Mohamed JCA**, dissenting) The presumption in s 35 of the Act that the property shall be deemed to be illegal property was applicable in a claim proceedings made under s 32(2) in respect of any property seized by the police under s 25 of the Act. This was primarily because the Act was enacted, inter alia, for the purposes of combating drugs trafficking and to prevent the perpetrators acquiring property by trafficking in dangerous drugs and to utilize property for such trafficking. From this, it is clear that the Act was designed to forfeit ill-gotten gains of dangerous drugs traffickers. Further, on the factual matrix of the present case, it was clear that the appellants' claim under s 32(3) of the Act was a proceeding in respect of the seized properties on the ground that such properties were illegal properties, and therefore under s 35, the properties seized ought to be presumed to be illegal properties. In addition s 2 of the Act provides a wide-ranging definition of illegal property. It would indeed be a startling proposition to say that the s 35 illegal property presumption could only be activated upon proof that the properties in question were in the first place illegal properties as defined in s 2 of the Act. It must not be so, for to rule otherwise would be to defeat the whole purpose of the presumption itself, which was an aid to the prosecution (see paras 9, 11–12, 19 & 22).

(9) (per **Azahar Mohamed JCA**, dissenting) However, based on the evidence adduced, the third and the fourth appellants had rebutted on the balance of probabilities the presumption of illegal property under s 35 of the Act and proven that they were lawfully entitled to the two movable properties seized and to the monies in the bank accounts (see paras 31–32).

[Bahasa Malaysia summary

Chan Kong Chuan ('perayu keempat') telah ditangkap kerana mengedar dadah berbahaya, satu kesalahan di bawah s 39B Akta Dadah Berbahaya 1952. Berikutan tangkapan itu polis telah menjalankan siasatan yang membawa kepada penyitaan harta-harta tertentu milik empat perayu di bawah s 25(1) Akta Dadah Berbahaya (Perlucuthakan Harta) 1988 ('Akta tersebut') atas alasan bahawa harta-harta tersebut merupakan harta-harta tidak sah yang diperolehi melalui kegiatan yang dilarang atau menyalahi undang-undang. Penyitaan harta-harta tersebut terdiri daripada wang tunai yang dipegang dalam akaun-akaun bank, pelbagai unit amanah dan juga beberapa hartanah seperti apartmen, yang keseluruhan nilainya lebih kurang RM3.5 juta. Berikutan penyitaan itu, polis telah mengeluar dan menyampaikan notis-notis bertulis secara berasingan berhubung penyitaan tersebut dan alasan-alasan

tersebut kepada perayu-perayu sebagai pemilik-pemilik harta-harta itu. Perayu-perayu kemudian telah memohon di bawah s 32(3) Akta tersebut untuk pelepasan harta yang disita kepada mereka atas alasan bahawa mereka berhak secara sah ke atas harta-harta tersebut. Menurut keperluan s 32 Akta tersebut, pendakwa raya telah merujuk tuntutan perayu-perayu kepada mahkamah sesyen untuk keputusan. Hakim mahkamah sesyen memutuskan bahawa responden-responden telah gagal untuk mematahkan andaian di bawah s 35 Akta tersebut bagi melayakkan pelepasan harta-harta itu kepada mereka. Sewajarnya, beliau telah memerintahkan harta-harta yang disita itu dilucuthakkan. Rayuan perayu-perayu terhadap perintah pelucutanhak mahkamah sesyen telah ditolak oleh hakim Mahkamah Tinggi, yang memutuskan bahawa andaian di bawah s 35 Akta tersebut terpakai kepada prosiding di bawah s 32(3) Akta tersebut. Ini adalah rayuan perayu-perayu terhadap perintah tersebut. Dalam rayuan ini perayu-perayu berhujah bahawa s 35 Akta tersebut yang memperuntukkan untuk andaian tidak patut terpakai dalam konteks prosiding di bawah s 32(3) Akta tersebut. Sebagai sokongan, perayu-perayu bergantung kepada keputusan Mahkamah Rayuan dalam kes *Public Prosecutor v Lim Kim Hoei & Anor* [2014] 3 MLJ 534 ('kes *Lim Kim Hoei*'). Kedudukan yang diperjuangkan oleh pendakwaan, sebaliknya, adalah andaian di bawah s 35 Akta tersebut hendaklah boleh terpakai kepada semua prosiding di bawah Akta tersebut. Pendakwaan telah berhujah bahawa Mahkamah Rayuan dalam kes *Lim Kim Hoei* terkhilaf dari segi undang-undang untuk mencapai kepada keputusannya dalam memutuskan sebagaimana dilakukannya, terutamanya di mana andaian harta tidak sah itu tidak patut terpakai kepada harta yang disita yang merupakan hal perkara tuntutan seseorang/penuntut di bawah s 32(3) Akta tersebut. Sebaliknya, pendakwaan berhujah bahawa keputusan Mahkamah Rayuan dalam kes *Cherian a/l KC George & Anor v Public Prosecutor* [2012] 4 MLJ 537 ('kes *Cherian*') patut menjadi pendapat yang dipilih berhubung undang-undang untuk hal perkara yang sedang diteliti. Ia adalah kes pendakwaan di mana frasa 'any proceedings' dalam s 35 Akta tersebut patut termasuk prosiding di bawah s 32(3) Akta tersebut dan bahawa kes *Lim Kim Hoei* tidak menggalakkan tujuan atau matlamat Akta tersebut yang bertentangan dengan keputusan dalam kes *Cherian*. Dalam kes ini, yang melibatkan tuntutan perayu-perayu untuk pengembalian harta-harta yang disita oleh polis menurut s 25(1) Akta tersebut, mahkamah ini mempunyai peluang untuk memeriksa semula isu-isu tentang sama ada penuntut-penuntut, semasa membuktikan tuntutan mereka ke atas harta itu di bawah s 32(3) Akta tersebut juga perlu mematahkan andaian 'illegal property', yang termaktub di bawah s 35 Akta tersebut dan untuk menyelesaikan dua keputusan yang bercanggah itu.

Diputuskan:

(1) Peruntukan s 32 Akta tersebut membenarkan sesiapa untuk membuat tuntutan ke atas harta yang disita oleh polis dalam tempoh tiga bulan

daripada penyitaannya. Tiada niat jelas dalam susun kata s 32(3) Akta tersebut bahawa bagi tujuan membuktikan harta itu adalah sah miliknya, penuntut juga dikehendaki membuktikan secara negatif, yang harta itu bukan harta tidak sah. Inti pati perkara itu adalah sebagai penuntut, dia perlu membuktikan tuntutannya atas imbangan kebarangkalian, sama seperti sesiapa dalam kes sivil yang menginginkan penghakiman dimasukkan menyebelahinya oleh mahkamah. Beban itu terletak pada penuntut di bawah s 32(3) Akta tersebut bukan kerana andaian di bawah s 35 terpakai kepada prosiding di bawah s 32(3) tetapi kerana dia telah membuktikan kesnya agar mahkamah berpuas hati dan memberikan penghakiman menyebelahinya (lihat perenggan 60 & 73–74).

(2) Semua peruntukan dalam Akta tersebut hendaklah dipertimbangkan dengan mengambil kira sewajarnya peruntukan lain yang terkandung dalam statut yang sama, dan hendaklah ditafsirkan secara harmoni agar dapat mengekalkan integriti kerangkanya, dengan memberi kesan kepada tujuan Parlimen untuk memperuntukkan dalam pelbagai rejim yang diwujudkan dalam Akta tersebut. Adalah jelas bahawa Akta Dadah Berbahaya (Perlucuthakan Harta) 1988 ('Akta tersebut') telah membentuk tiga rejim berasingan di mana set prosedur berasingan diperuntukkan untuk setiap satu, iaitu rejim pendakwaan kesalahan, rejim perampasan harta tidak sah, dan prosiding yang terkandung di bawah s 32(3) berkaitan tuntutan oleh seseorang ke atas harta yang didakwanya sebagai pemilik yang sah. Dalam erti kata itu, ss 35 dan 32(3) Akta tersebut adalah, dari segi fakta dan undang-undang, saling eksklusif. Kesimpulan sebegitu diperkukuhkan oleh s 2 Akta tersebut, yang mengandungi kelayakan 'unless the context otherwise requires'. Dengan mengguna pakai s 35 Akta tersebut keseluruhannya kepada s 32(3) akan menghalang terhadap perkataan-perkataan jelas s 35 di mana jelas konteks s 35 adalah berkenaan prosiding 'against any person or in respect of any property on the ground that such person is a liable person or that such property is illegal property' oleh pendakwaan. Dalam keadaan itu s 35 Akta tersebut tidak patut terpakai dalam prosiding di mana orang yang menuntut untuk pengembalian harta, yang mana didakwanya adalah miliknya yang sah. Oleh itu, prosiding di bawah s 32(3) Akta tersebut bukan prosiding yang terkandung di bawah s 35 Akta tersebut dan tidak akan sejajar dengan niat pembuat undang-undang dan akan melanggar susunan kata yang jelas s 35 Akta tersebut. Untuk sebab-sebab tersebut andaian harta tidak sah di bawah s 35 tidak terpakai dalam prosiding di bawah s 32(3) Akta tersebut (lihat perenggan 65–66 & 70–71).

(3) Dalam kes *Lim Kim Hoei*, iaitu kes Mahkamah Rayuan terkini yang memutuskan hubung kait dua seksyen tersebut di bawah Akta tersebut, Mahkamah Rayuan mengutarakan kes *Cherian* dan membuat kesimpulan bahawa jika 'the issues and the case law authorities been fully

ventilated before the panel in *Cherian*'s case, the panel then would probably have come to a different conclusion'. Kes ini ingin menyelesaikan konflik yang jelas wujud menurut dua keputusan yang timbul dari mahkamah ini, iaitu kes *Cherian* dan kes *Lim Kim Hoei*. Sebagai mahkamah yang menyelaraskan bidang kuasa, mahkamah ini bebas untuk memilih keputusan bercanggah mana untuk diikuti tanpa mengira umur relatif mereka. Ini adalah satu daripada tiga pengecualian kepada rukun am bahawa Mahkamah Rayuan adalah terikat dengan keputusannya sendiri, dan membentuk sebahagian besar dan penting prinsip stare decisis. Dalam keadaan itu, adalah jelas bahawa keputusan mahkamah ini dalam kes *Lim Kim Hoei* adalah pendapat yang terpilih kerana, sebagaimana disebut di atas, ia adalah pendapat yang wajar dan patut dari segi undang-undang dalam menentukan sama ada andaian harta tidak sah patut terpakai dalam prosiding di bawah s 32(3) Akta tersebut. Adalah jelas bahawa tiada kekaburan dari segi bahasa yang digunakan di bawah s 35 Akta tersebut dan bahawa seksyen itu bermaksud apa yang dikatakannya (lihat perenggan 77–78).

(4) Oleh kerana Akta tersebut adalah undang-undang khas yang digubal di bawah perkara 149 Perlembagaan Persekutuan, yang menjadikan pelucutan hak harta persendirian dan peletakhakannya dalam kerajaan sah meskipun hak-hak asasi diperuntukkan dalam perkara 13, ia perlu ditafsirkan agar hak-hak seseorang disah dan diiktirafkan seperti yang diperuntukkan di bawah s 32(3) Akta tersebut tidak terjejas. Integriti kerangka perundangan dengan pelbagai rejimnya hendaklah dikekalkan. Dalam erti kata itu peruntukan peruntukan itu hendaklah ditafsirkan dalam sedemikian cara untuk membentuk dan mengekalkan harmoni dalam hubung kait antara pelbagai peruntukannya, inter se. Oleh itu, adalah jelas bahawa andaian ketaksahan atas harta itu tidak terpakai terhadap harta yang disita (lihat perenggan 82–83).

(5) Dalam menentukan sama ada perayu-perayu telah berjaya membuktikan bahawa harta-harta tersebut bukan harta-harta tidak sah dan bahawa mereka berhak secara sah ke atas harta-harta tersebut maka adalah perlu untuk memeriksa keterangan yang dikemukakan oleh perayu-perayu. Dalam erti kata ini adalah ditekankan bahawa hakim mahkamah sesyen telah benar-benar mengabaikan pendapatan yang diperoleh oleh perayu ketiga dan keempat dari masa mereka mula bekerja sehingga 1992, iaitu tempoh 17 dan 16 tahun masing-masing, berasaskan bahawa kebanyakan harta telah dibeli sejak 1995. Selanjutnya, hakim mahkamah sesyen telah benar-benar mengabaikan keterangan bahawa perayu ketiga telah menerima bayaran tunai kehilangan pekerjaan sejumlah RM38,172.50 dan bahawa dalam tahun 1997 dia telah dibayar sejumlah RM45,000 oleh Great Eastern Life Insurance Co untuk polisi yang telah matang. Tiada sebab kenapa keterangan tersebut patut tidak dihiraukan atau ditolak, terutamanya jika tidak dicabar oleh pendakwaan.

Tambahan, mahkamah sesyen juga benar-benar mengabaikan keuntungan yang mungkin diperoleh oleh perayu-perayu melalui pelaburan licik dan teliti perayu-perayu daripada pendapatan pekerjaan mereka dan sumber pendapatan sah mereka yang lain. Terdapat keterangan mencukupi yang dikemukakan di hadapan mahkamah sesyen agar ia melepaskan dua harta boleh alih kepada perayu-perayu. Tiada apa-apa yang sememangnya mustahil dalam penjelasan yang diberikan oleh perayu-perayu berhubung bagaimana mereka boleh menguruskan dari segi kewangan untuk memperoleh dua apartmen. Dengan ketiadaan apa-apa keterangan yang bertentangan, mahkamah sesyen dan Mahkamah Tinggi patut mendapati bahawa perayu-perayu telah berjaya membuktikan, atas imbangan kebarangkalian, bahawa dua harta boleh alih bukan harta tidak sah dan bahawa mereka berhak secara sah kepada yang sama (lihat perenggan 88–89, 93–95 & 106).

(6) Perayu-perayu telah mengemukakan keterangan mencukupi untuk membuktikan bahawa wang dalam akaun bank dan unit amanah adalah milik mereka. Dalam keadaan itu, hakim mahkamah sesyen dan hakim Mahkamah Tinggi terkhilaf kerana tidak mendapati perayu-perayu telah membuktikan, atas imbangan kebarangkalian bahawa wang dalam akaun bank itu bukan harta tidak sah dan bahawa perayu-perayu berhak secara sah ke atas wang itu (lihat perenggan 116–117, 122 & 138–139).

(7) (oleh **Azahar Mohamed HMR**, menentang) Doktrin stare decisis, rukun penting *common law*, patut diterima dengan penuh hormat. Dalam keadaan kes *Cherian*, yang dengan tepat menggalakkan tujuan atau matlamat sebagaimana terkandung dan jelas dinyatkaan dalam Akta tersebut, hendaklah menjadi pilihan kerana ia adalah keputusan yang tidak dibuat per incuriam. Keputusan dalam kes *Cherian* oleh itu mengikat mahkamah ini dan mahkamah bawahan (lihat perenggan 6–8).

(8) (oleh **Azahar Mohamed HMR**, menentang) Andaian dalam s 35 Akta tersebut bahawa harta hendaklah dianggap harta tidak sah boleh terpakai dalam prosiding tuntutan yang dibuat di bawah s 32(2) berkaitan apa-apa harta yang disita oleh polis di bawah s 25 Akta tersebut. Ini terutamanya adalah kerana Akta tersebut telah digubal, antara lain, bagi tujuan membanteras pengedaran dadah dan untuk mengelakkan pelaku-pelaku daripada memperoleh harta melalui pengedaran dadah berbahaya dan untuk menggunakan harta untuk pengedaran sedemikian. Berdasarkan ini, adalah jelas Akta tersebut direka untuk menarik balik keuntungan haram pengedar-pengedar dadah berbahaya. Selanjutnya, atas matriks faktual kes ini, adalah jelas tuntutan perayu-perayu di bawah s 32(3) Akta tersebut adalah prosiding berkaitan harta-harta yang disita atas alasan bahawa harta-harta tersebut adalah harta-harta tidak sah, dan oleh itu di bawah s 35, harta-harta yang disita patut dianggap sebagai harta-harta tidak sah. Tambahan pula s 2 Akta

tersebut memperuntukkan tafsiran yang luas tentang harta tidak sah. Sememangnya ia cadangan yang mengejutkan untuk mengatakan bahawa andaian harta tidak sah s 35 hanya boleh diaktifkan berdasarkan bukti yang harta-harta dipersoalkan pada mulanya adalah harta-harta tidak sah sebagaimana ditafsirkan dalam s 2 Akta tersebut. Tidak sepatutnya begitu, kerana untuk memutuskan sebaliknya akan menggagalkan keseluruhan tujuan andaian itu sendiri, yang telah membantu pendakwaan (lihat perenggan 9, 11-12, 19 & 22).

(9) (oleh **Azahar Mohamed HMR**, menentang) Walau bagaimanapun, berdasarkan keterangan yang dikemukakan, perayu ketiga dan keempat telah mematahkan atas imbangan kebarangkalian andaian harta tidak sah di bawah s 35 Akta tersebut dan membuktikan bahawa mereka berhak secara sah ke atas dua harta boleh alih yang disita dan ke atas wang dalam akaun-akaun bank (lihat perenggan 31–32).]

Cases referred to

Cherian a/l KC George & Anor v PP [2012] 4 MLJ 537; [2012] 6 CLJ 17, CA (folld)
Dalip Bhagwan Singh v PP [1998] 1 MLJ 1, FC (refd)
Karam Singh v Menteri Hal Ehwal Dalam Negeri [Minister of Home Affairs], Malaysia [1969] 2 MLJ 129, FC (refd)
Metramac Corp Sdn Bhd (formerly known as Syarikat Teratai KG Sdn Bhd) v Fawziah Holdings Sdn Bhd [2006] 4 MLJ 113, FC (refd)
Mohamad Ezam bin Mohd Noor v Ketua Polis Negara & Other Appeals [2002] 4 MLJ 449, FC (refd)
Public Finance Bhd v PP [1999] 4 MLJ 143; [1999] 8 CLJ 485, HC (refd)
PP v Chia Leong Foo [2000] 6 MLJ 705, HC (refd)
PP v Lim Kim Hoei & Anor [2014] 3 MLJ 534; [2014] 4 CLJ 816, CA (folld)
PP v Ooi Seng Huat [1968] 2 MLJ 168 (refd)
PP v Tan Lee Kok [1998] 2 MLJ 65; [1998] 2 CLJ 286, CA (folld)
PP v Yuvaraj [1969] 2 MLJ 89, PC (refd)
Ram Narain v State of UP AIR 1957 SC 18, SC (refd)
Tang Kheng Teong & Anor v PP [1992] 2 MLJ 489; [1992] 3 CLJ Rep 672, HC (refd)
Teh Cheng Poh v PP [1979] 1 MLJ 50, PC (refd)
United Hokkien Cemetries, Penang v The Board, Majlis Perbandaran Pulau Pinang [1979] 2 MLJ 121, FC (refd)
Young v Bristol Aeroplane Co Ltd [1944] KB 718, CA (refd)

Legislation referred to

Dangerous Drugs (Forfeiture of Property) Act 1988 ss 2, 7, 7(4)(b), 25, 25(1), (2), 32, 32(1), (2), (3), 34, 35, Form 17
Dangerous Drugs (Special Preventive Measures) Act 1985
Dangerous Drugs Act 1952 s 39B

A Federal Constitution arts 5, 9, 10, 13, 13(2), 149
Interpretation Acts 1948 and 1967 s 17A

Appeal from: Criminal Appeal Nos 42–51–08 of 2012, 42–52–08 of 2012, 42–53–08 of 2012 and 42–54–08 of 2012 (High Court, Pulau Pinang)

B

Jason Khor Jit Sheng (Tan Guat Cheng with him) (V Parthipan & Khor) for the appellants.
Anselm Charles Fernandis (Thangavelu A Suppiah with him) (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

C

Azahar Mohamed JCA (delivering minority decision of the court):

[1] This is an appeal by the appellants against the decision of the High Court which had affirmed the order of forfeiture of certain seized properties by the sessions court under s 32 of the Dangerous Drugs (Forfeiture of Property) Act 1988 ('the Act'). The properties in question were seized by the police under s 25(1) of the same Act.

D

E

[2] The principal question of law for the determination by this court is whether the presumption of illegal property under s 35 of the Act is applicable to a proceedings under s 32 of the same Act.

[3] In connection with this question, this court in the case of *Cherian a/l KC George & Anor v Public Prosecutor* [2012] 4 MLJ 537; [2012] 6 CLJ 17 answered the question in the positive. This court held that the presumption under s 35 of the Act is applicable to a proceeding under s 32; the wordings in s 35 are very clear wherein it uses the words 'any proceedings' which must be given the ordinary meaning that it covers all proceedings under the Act; and to say that a proceeding under s 32(3) is not a proceeding that is envisaged under s 35 would not be in tandem with the intention of the law makers and would be in violation to the clear wordings of s 35.

F

G

[4] The decision of this Court in *Cherian a/l KC George & Anor v Public Prosecutor* was however not followed in the case of *Public Prosecutor v Lim Kim Hoei & Anor* [2014] 3 MLJ 534; [2014] 4 CLJ 816. In *Public Prosecutor v Lim Kim Hoei & Anor*, this court held that the presumption in s 35 is not applicable in a claim made under s 32(2) for the return of any property seized by the police under Part IV of the Act.

H

I

[5] The opportunity presented itself in the present appeal for this court to re-examine this important question of law in the light of the conflicting decisions.

[6] In the first place, it is very important to keep in mind that the doctrine of stare decisis dictates that as a matter of a general rule of great importance the Court of Appeal is bound to follow a decision of its own save in three main exceptions. This principle is firmly embedded in our administration of justice system and can be seen in the case of *Dalip Bhagwan Singh v Public Prosecutor* [1998] 1 MLJ 1. In delivering the judgment of the Federal Court, Peh Swee Chin FCJ said:

> The doctrine of stare decisis or the rule of judicial precedent dictates that a court other than the highest court is obliged generally to follow the decisions of the courts at a higher or the same level in the court structure subject to certain exceptions affecting especially the Court of Appeal.
>
> The said exceptions are as decided in *Young v Bristol Aeroplane Co ltd* [1944] KB 718. The part of the decision in *Young v Bristol* in regard to the said exceptions to the rule of judicial precedent ought to be accepted by us as part of the common law applicable by virtue of Civil Law Act 1956 vide its s 3.
>
> To recap, the relevant ratio decidendi in *Young v Bristol Aeroplane* is that there are three exceptions to the general rule that the Court of Appeal is bound by its own decisions or by decision of courts of coordinate jurisdiction such as the Court of Exchequer Chamber. The three exceptions are first, a decision of Court of Appeal given per incuriam need not be followed; secondly when faced with a conflict of past decisions of Court of Appeal, or a court of coordinate jurisdiction, it may choose which to follow irrespective of whether either of the conflicting decisions is an earlier case or a later one; thirdly it ought not to follow its own previous decisions when it is expressly or by necessary implication, overruled by the House of Lords, or it cannot stand with a decision of the House of Lords. There are of course further possible exceptions in addition to the three exceptions in *Young v Bristol Aeroplane* when there may be cases the circumstances of which cry out for such new exceptions so long as they are not inconsistent with the three exceptions in *Young v Bristol Aeroplane*.

[7] The doctrine of stare decisis was held by the Federal Court in the case of *Metramac Corp Sdn Bhd (formerly known as Syarikat Teratai KG Sdn Bhd) v Fawziah Holdings Sdn Bhd* [2006] 4 MLJ 113, to be a fundamental rule of common law.

[8] It has to be said that any decision of the Court of Appeal is to be treated with utmost deference. With greatest respect, I am of the considered view that the decision in *Cherian a/l KC George & Anor v Public Prosecutor* is correct and should be followed. I am in full agreement with the learned deputy public prosecutor ('the DPP') that *Cherian a/l KC George & Anor v Public Prosecutor* accurately promotes the purpose or object as embodied and expressly stated in the Act, and should be preferred given that it is a decision not made per incuriam, and is therefore binding on this court and the courts below.

[9] In my judgment, the presumption in s 35 that the property shall be deemed to be illegal property is applicable in a claim proceedings made under s 32(2) in respect of any property seized by the police under s 25 of the Act. I now give my reasons.

[10] To start with, it is imperative to point out that the Act was enacted by Parliament in pursuance of art 149 of the Federal Constitution, which concerns with the special powers of Parliament and the Executive to deal with emergencies and subversion. The Act explicitly recites that 'action has been taken and further similar action is being threatened by a substantial body of persons both inside and outside Malaysia (1) to organise and carry out trafficking in dangerous drugs, including their importation into and exportation from Malaysia; (2) to spread the dependence on dangerous drugs among various classes of people in Malaysia, thereby causing widespread detriment to public health, security, safety and morals; and (3) to acquire property by trafficking in dangerous drugs and to utilise property for such trafficking; and the action taken and threatened is prejudicial to public order in Malaysia; and that Parliament considers it necessary to stop such action'.

[11] This is why, this Act is valid even though it contains provisions contrary to or inconsistent with the fundamental liberties of the person such as art 5 (relating to personal liberty), art 9 (relating to prohibition of banishment and freedom of movement, art 10 (relating to freedom of speech, assembly and association, and more importantly, art 13 (relating to rights of property) of the Federal Constitution (see *Karam Singh v Menteri Hal Ehwal Dalam Negeri [Minister of Home Affairs], Malaysia* [1969] 2 MLJ 129, *Teh Cheng Poh v Public Prosecutor* [1979] 1 MLJ 50 and *Mohamad Ezam bin Mohd Noor v Ketua Polis Negara & Other Appeals* [2002] 4 MLJ 449). The avowed objectives of the Act as declared in the preamble are 'to make provisions for offences in relation to property, and for the seizure and forfeiture of property, connected with activity related to offences under this Act, the Dangerous Drugs Act 1952, or any foreign law corresponding to these Acts or to the provisions for offences under these Acts; for assistance to foreign countries in relation to matters connected with dangerous drugs; and for matters connected with the aforesaid provisions'. Tellingly, the Act was enacted, inter alia, for the purposes of combating drugs trafficking and to prevent the perpetrators acquiring property by trafficking in dangerous drugs and to utilise property for such trafficking. From this, it is clear that the Act was designed to forfeit ill-gotten gains of dangerous drugs traffickers.

[12] The point to make here is this: in the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall

be preferred to a construction that would not promote that purpose or object (see s 17A of the Interpretation Acts 1948 and 1967). More significant still is the provision of s 34 of the Act, which makes it patent that in any proceedings under this Act, the provisions of this Act shall be construed and interpreted so as to give effect to the purposes of this Act without regard for ambiguities, or infirmities of language, or other defects or deficiencies therein, or to objections which are trivial in nature or which do not affect the merits or the substance of the issues before the court.

[13] It is against the above background, in my view, the principal question of law should be determined by this court.

[14] To put the question for determination in perspective and for ease of reference, it will be useful at this point to take a closer look at the relevant provisions of the Act in so far as they are relevant to the present appeal.

[15] The pertinent provision is s 25:

> (1) Any movable property which a senior police officer reasonably suspects to be the subject matter of an offence under this Act, or which has been used for the commission of that offence, or illegal property, shall be liable to seizure.
>
> (2) Whenever any movable property is seized under subsection (1), the officer effecting the seizure shall as soon as practicable serve a notice in writing of such seizure and the grounds thereof on the owner of such property, if such owner and his whereabouts are known: Provided that such notice shall not be required to be served where such seizure is made in the presence of the person against whom proceedings under Part III are intended to be taken, or in the presence of the owner of such property or his agent, or in the he presence of the owner of such property or his agent, or in the case of a ship or an aircraft, in the presence of the master or pilot as the case may be.

Another relevant provision is s 32:

> (1) Where any property has been seized under this Act, other than under or by virtue of Part VII, and —
>
> (a) No prosecution for any offence under any law is instituted with regard to such property;
>
> (b) No proceedings are commenced by the Public Prosecutor for the forfeiture of such property under Part III; and
>
> (c) No claim in writing is made by any person that he is lawfully entitled to such property and that it is not liable to forfeiture under this Act or under the Dangerous Drugs Act 1952,

A within three months from the date of its seizure, the property shall become forfeited immediately upon the expiration of the said period of three months.

B (2) Where within three months from the date of the seizure of any property under this Act, a claim in writing is made thereto by any person in the terms mentioned in paragraph (l)(c), the Public Prosecutor shall within fourteen days after the expiry of the said period of three months, refer such claim to a Sessions Court for its decision.

C (3) The Sessions Court to which a claim is referred under subsection (2) shall issue a summons requiring the person claiming that he is lawfully entitled to the property, and the person from whom it was seized, if he and his whereabouts are known, to appear before the court and upon such appearance or in default of such appearance, upon due service of such summons being proved, the Sessions Court shall proceed to the D examination of the matter and if satisfied that no offence under this Act or under the Dangerous Drugs Act 1952 has been committed in respect of the property claimed and that such property is not illegal property, shall order the same to be released to the person claiming the same upon proof that he is lawfully entitled thereto, and shall, in any other case, order the E property to be forfeited.

(4) The provisions of this section shall be without prejudice to the power of a police officer to release from seizure any property under section 31.

(5) Where property has been forfeited under subsection (1), it shall not be a F bar to any prosecution for an offence under any law being instituted in respect of such property at any time thereafter.

[16] Section 35 of the Act, which falls under Part VI relating to evidence and procedure, reads:

G Where any proceedings under this Act are brought against any person or in respect of any property on the ground that such person is a liable person or that such property is illegal property, the Court shall presume that person to be a liable person and that property to be illegal property, unless the person proceeded against proves to the contrary by admissible evidence and where he adduces any such evidence, the H Public Prosecutor shall have the right to rebut the same.

[17] Section 35 is a general presumption provision. The wordings of the provision are clear and unequivocal. It is important to note that in s 35, the phrase 'Where any proceedings under this Act' is not without qualification. I Indeed, the phrase is qualified with the words 'are brought against any person or in respect of any property on the ground that the person is a liable person or that such property is illegal property'.

[18] For that reason, a prerequisite for the operation of the presumption of

illegal property under s 35 is that the proceedings under the Act are brought:

(a) against any person on the ground that the person is a liable person; or

(b) in respect of any property on the ground that such property is illegal property.

[19] On the factual matrix of the present case, it is my view that the appellants' claim under s 32(3) of the Act was a proceeding in respect of the seized properties on the ground that such properties were illegal properties, and therefore under s 35, the court shall presume that properties to be illegal properties. The undisputed background facts and sequence of events disclosed that following the arrest of Chan Kong Chuan, the fourth appellant on the ground that he was involved in trafficking of dangerous drugs under s 39B of the Dangerous Drugs Act 1952, an investigation carried out by the police led to the seizure of certain properties belonging to the appellants under s 25(1) on the ground that the police had reason to believe that these properties constituted illegal properties under the Act. In this regard, s 25(1) is explicit in that any movable property which a senior police officer reasonably suspects to be the subject matter of an offence under this Act, or which has been used for the commission of that offence, or illegal property, shall be liable to seizure. In other words, s 25(1) made seizure compulsory, inter alia, on the ground that the property was illegal. Subsequent to the seizure, the police issued separate Form 17 notices under s 25(2) of the Act. Section 25(2) requires the police officer to serve a notice in writing of such seizure and the grounds thereof to the owner of the properties. Significantly, s 32(1) particularly provides that if no claim is made within three months by anyone that he is lawfully entitled to such property, the property shall become forfeited immediately upon the expiration of the said period of three months.

[20] Continuing with the background facts and the sequence of events, the appellants applied under s 32(2) for the properties to be released to them on the ground that they are lawfully entitled to those properties. In this way, the appellants were claiming for the return of the properties seized by the police pursuant to s 25(1). In accordance with the requirements of s 32(2), the public prosecutor then referred the appellants' claim to the sessions court for decision. As can be appreciated from s 32, the terms of the provisions were broadly drafted. It is evident from a consideration of the factual matrix that the appellants' claim is a claim in respect of any property on the ground that such property is illegal property, and is therefore a proceeding caught by s 35.

[21] My view is fortified by the provisions of s 32(3), which, inter alia, states that upon receipt of the public prosecutor's reference, the sessions court shall then issue a summons requiring the person claiming to appear and upon

appearance, the court shall proceed with the inquiry with the view to ascertain, to its satisfaction, whether an offence under the Act or under the Dangerous Drugs Act 1952 has been committed in respect of the property; if no such offence has been committed and *that such property is not illegal property*, the court shall release the property to the person making the claim upon proof that he is entitled thereto, and shall, in any other case, order the property to be forfeited. As submitted by the learned DPP, what stands out is that the underlined phrase itself indicates and underscored the applicability of the presumption of illegal property under s 35 to a claim proceeding under s 32. When look in this way, one can see that the presumption under s 35 is applicable to a proceeding under s 32 of the Act.

[22] Even more to the point, s 2 of the Act provides a wide-ranging definition of illegal property. It would indeed be a startling proposition to say that the s 35 illegal property presumption is activated only upon proof that the properties in question are in the first place illegal properties as defined in s 2 of the Act. It must not be so, for to rule otherwise would be to defeat the whole purpose of the presumption itself, which is an aid to the prosecution. In this regard, it is clear on principle and on authority that evidence which cannot be proved by direct or circumstantial evidence can be led with the aid of statutory presumption and that as a matter of law a presumption is a statutory invention that upon the proof of a fact an inference of another fact can be drawn (see *Public Prosecutor v Ooi Seng Huat* [1968] 2 MLJ 168 and *Public Prosecutor v Chia Leong Foo* [2000] 6 MLJ 705).

[23] There is one further point that I need to take into consideration. It is true that the claimants in this case were the appellants. This raises the question: what exactly is the meaning of the words 'the person proceeded against' as appearing in s 35 of the Act? As a general statement of a broad legal proposition, the meaning of words and expression used in an Act must take their colour from the context in which they appear (per SK Das J in *Ram Narain v State of UP* AIR 1957 SC 18 quoted with approval by our Federal Court in *Metramac Corp Sdn Bhd (formerly known as Syarikat Teratai KG Sdn Bhd) v Fawziah Holdings Sdn Bhd*. In interpreting those words, the purposive approach must be adopted as it will promote the general Legislative purpose underlying the provision in question (see *United Hokkien Cemetries, Penang v The Board, Majlis Perbandaran Pulau Pinang* [1979] 2 MLJ 121). Therefore, in the context in which the aforesaid words were used and given the provisions of s 34, which I have alluded to earlier, the proper meaning to be given to those words is that it refers to the claimant in a claim proceeding under s 32, such as the appellants in the present case.

[24] In this regard, the reach and scope of operation of s 35 can be seen in *Public Finance Bhd v Public Prosecutor* [1999] 4 MLJ 143; [1999] 8 CLJ 485,

where a car was seized by the police from one Azlin under s 25 of the Act. Pursuant to the powers conferred by s 32(3) of the Act, the sessions court issued out a summons to Azlin and the appellant, calling them to establish their respective claims for the release of the car. The car was owned by the appellant but it had been hired under a hire purchase agreement to one Mohd Anwar, the hirer. The hirer did not make any claim although he was notified of the proceeding. Azlin told the court that he bought the car from the hirer using proceeds from his business as well as money earned from transacting in drugs. The sessions court found that the car was an illegal property and thus ordered the forfeiture of the car. The appellant appealed. The issue before the court was whether the car was an illegal property upon a proper reading of the relevant provisions of the Act. The High Court held that by virtue of s 35 of the Act, where any proceeding is brought against any property on the ground that such property is illegal property, the court must presume that property to be illegal property. The presumption, however, is rebuttable by admissible evidence. In the words of Nik Hashim J (as he then was), with the necessary emphasis:

> In the present case, the car, suspected to be illegal property, was seized under s 25, and by virtue of s 35 where any proceeding is brought against any property on the ground that such property is illegal property, the court shall presume that property to be illegal property. The presumption however, is rebuttable by admissible evidence.
>
> Section 35 is clear in its provisions. Thus, with respect, I do not agree with counsel's contention that the presumption is not applicable to the appellant. *Besides Azlin, the appellant was also a person 'proceeded against' in the claim proceeding, for the proceeding under s 32(3) is a proceeding within the meaning of 'any proceedings in respect of any illegal property under s 35 of the Act. Thus in this case, the presumption is egually applicable to the appellant'.*

[25] It is significant and I reiterate that the above legal proposition, which is directly on point, was approved by this court in *Cherian a/l KC George & Anor v Public Prosecutor*.

[26] For all these reasons, to my mind, the purpose of the Act is accomplished by holding, as in the case of *Cherian a/l KC George & Anor v Public Prosecutor*, that the appellants' claim to the sessions court was a proceeding regulated by s 35, and therefore the presumption under s 35 is applicable to a proceeding under s 32 of the Act.

[27] In *Public Prosecutor v Lim Kim Hoei & Anor*, the court, inter alia, stated:

> Proceedings for the forfeiture of any illegal property of a liable person or a holder are provided for in the procedure laid out in Part III of the Act which covers ss 7–14.
>
> Based on the scheme of the Act under Part III, it is clear that under the Act the only person liable to be proceeded against under the Act is a liable person and the only

properties liable to forfeiture are the properties of a liable person or holder of properties which the public prosecutor has any reason to believe are illegal properties.

In addition, to provide the necessary bite to the powers of the public prosecutor in a forfeiture proceeding under Part III, the Act provides in s 35 for certain presumptions to enable the court to presume, until the person proceeded against proves to the contrary, that he is a liable person or the property proceeded against is illegal property.

While it is not disputed that any property seized under this Act may be forfeited if they fall within the circumstances stated in s 32(1), however, it is our view that, unlike a forfeiture proceedings under Part III, the presumptions under s 35 of the Act do not apply to a claim made under s 32(2) for the release of such property. This is because under s 32 no proceedings is brought against any person or in respect of any property on the ground that such a person is a liable person or that such property is illegal property. Instead, s 32(2) relates to a claim made by a person in respect of any property seized by the police pursuant to Part IV of the Act for which, (i) no prosecution for any offence under any law is instituted with regard to such property; and (ii) no forfeiture proceedings are commenced by the public prosecutor for the forfeiture of such property under Part III.

[28] With respect, s 2 of the Act states that 'proceedings under this Act' means any proceedings under any provision of this Act, including any prosecution for an offence under this Act. The word 'including' in the interpretation section enlarges the scope and meaning of the words 'proceedings under this Act'. The word 'including', therefore, is a term of extension (see *Words, Phrases & Maxims Legally & Judicially Defined*, Anandan Krishnan, Vol 9, Lexis Nexis, p 374). As such, 'proceeding under this Act' would include too any action taken against any person or in respect of any property on the ground that such person is a liable person or that such property is illegal property, for example, by the public prosecutor taking the role of a 'forwarding agent' under s 32(2) of the Act (see per Shaikh Daud JCA *Public Prosecutor v Tan Lee Kok* [1998]2 MLJ 65; [1998] 2 CLJ 286). In my view, the application of the presumption in s 35 is part and parcel of the evidence and procedure laid out in Part VI of the Act for any proceedings under the Act, be it under Part III or s 32. Section 35 is an all-purpose presumption provision. Proceedings under Part III and s 32 are forfeiture proceedings in respect of distinct matters, ie persons liable to be proceeded against and the seized property. There can be no doubt that the proceedings undertaken by the sessions court under s 32(2) of the Act is governed by special provisions under Part VI of the Act. Section 35 does not make a distinction for the application or non-application of the presumption to certain matters only. A literal reading will indicate that it is applicable to any proceedings under the Act. Section 32 should be read as a whole and not be limited to only a proceeding for the release of such property. This is because s 32 is not only about the release of such property but includes the sessions court making an order for the forfeiture of

such property should the person claiming the property is unable to show proof that he is lawfully entitled to it.

[29] So far I have expressed my views on the law. Finally, I next move to consider the merit of the present appeal. As I have discussed earlier, the presumption under s 35 is applicable to a claim proceeding under s 32. It is trite law that the standard of proof required to rebut a rebuttable statutory presumption is on a balance of probabilities (see *Public Prosecutor v Yuvaraj* [1969] 2 MLJ 89). The burden has shifted to the appellants to prove by admissible evidence on a balance of probabilities that properties in question are not illegal properties and that they are lawfully entitled to the said properties. The burden of proof to rebut the presumption under s 35 must be read at the same time with the onus as laid down under s 32(3) of the Act; the burden is on the claimants that they are lawfully entitled to the properties.

[30] Both the sessions court and the High Court had made concurrent findings of facts that the appellants had failed to discharge the burden. I am mindful of the general principle of law that an appellate court is generally very reluctant to disturb finding of fact by any trial judge. Notwithstanding that, it is always open for this court to interfere if the findings thus made were unsupported by evidence or against the weight of evidence, or if there was no proper judicial appreciation of the evidence or if there was any misdirection in law. In this regard, I have had the privilege of reading the judgment of my learned brother Abang Iskandar bin Abang Hashim JCA in draft. I agree with His Lordship's analysis of the evidence to the effect that the appellants' legitimate sources of income were ignored by both the sessions court and the High Court. In my view, there was no proper judicial appreciation of the evidence and failure to evaluate the evidence constitutes a serious misdirection on the part of both the sessions court and the High Court thereby warranting intervention by this court.

[31] On the facts of the present case, I am of the view that in respect of the following properties, the third and fourth appellants had rebutted on the balance of probabilities the presumption of illegal property under s 35 of the Act and that the appellants are lawfully entitled to them:

(a) property E26: RM23,067.05 in HSBC Premier Account No 371243353028;

(b) property E27: RM53,778.96 in HSBC Fixed Deposit Account No 371243353131;

(c) property E38 — the 'Putera Place Condominium'; and

(d) property E39 — the 'Gold Coast Apartment'.

[32] I am also of the view that in respect of the following properties, the fourth appellant had rebutted on the balance of probabilities the presumption of illegal property under s 35 of the Act and that he is lawfully entitled to them:

(a) property E29: money in Public Mutual Gold Account No 443408611 (Public Select Bond — RM221,624.96); and

(b) property E36: money in Hong Leong Public Mutual Gold Account No 06277001362.

[33] In respect of the other seized properties, no evidence was led by the appellants to rebut the presumption. The sessions court was for that reason correct in refusing to order the release of such properties to the appellants.

[34] Accordingly, the order of the High Court is set aside. I allow these appeals in part and order that the properties identified as E26, E27, E38 and E39 be released to the third and fourth appellants and the properties identified as E29 and E36 be released to the fourth appellant.

Abang Iskandar JCA (delivering majority judgment of the court):

THE BRIEF FACTS

[35] This appeal before us emanated from the Penang High Court which had dismissed the appeal filed by four persons/the claimants who had staked their claims over certain properties that were seized by the police, in exercise of powers under the Dangerous Drugs (Forfeiture of Properties) Act 1988 ('the FOP Act'). The seized properties were suspected to be illegal properties obtained through prohibited or illegal activities. The seized properties consisted of cash held in bank accounts, various unit trusts as well as several landed properties such as apartments. The proceedings in which the claims made by the appellants were inquired into were held pursuant to s 32(3) of the FOP Act before the sessions court. The total value of the seized properties was stated at about RM3.5m. The appeal before the High Court in Penang had come about pursuant to an adverse order, made in respect of part of those properties, by the Sessions Court in Butterworth, Penang, which had ordered forfeiture against most of the seized properties, upon it being not satisfied that the appellants were lawfully entitled to them.

[36] The basis of the appeal against the adverse order of the sessions court has been the fact that the sessions court judge had wrongly applied the presumption of illegal property under s 35 of the FOP Act against the seized properties in determining their claims pursuant to 32(3). The appellants were also aggrieved when the sessions court judge had proceeded to rule that they had failed to rebut the said presumption thereby rendering their claims

over most of the seized properties unsuccessful, thus culminating in the forfeiture order by the sessions court.

[37] Their appeal against the sessions court's order of forfeiture before the Penang High Court was dismissed when the learned judge ruled that the presumption under s 35 of the FOP Act applied in a s 32(2) proceedings. At p 23 of the record of appeal, the learned High Court judge had stated:

> Setelah saya membaca rekod rayuan, termasuk Alasan Penghakiman HMS, dan penghujahan bertulis pihak Penuntut-Penuntut/Perayu-Perayu dan juga penghujahan bertulis pihak Responden, saya mendapati bahawa anggapan statut di bawah s 35 Akta adalah terpakai dalam kes rujukan harta di bawah s 32(3) Akta: sila lihat kes Mahkamah Rayuan *Cherian a/l KC George v Public Prosecutor* [2012] MLJK 140.

[38] He had also agreed on the extent of the forfeiture order issued by the sessions court judge and ultimately had affirmed the decision of the sessions court judge, in toto.

[39] Aggrieved as it were, by the High Court decision, the same four claimants had since filed in their notices of appeal against the impugned decision so that they could ventilate their grievances before appeal judges in the Court of Appeal. That has accounted for this appeal that is before us now. However, the appeal of the second appellant, namely Raymond Chan Tse Zhen was dismissed on his failure to attend court hearing on the appointed date, namely 22 May 2014 and as such he had no competent appeal before us when the court sat to hear parties' oral submissions in open court on 17 July 2014. Having heard the respective oral submissions, we indicated to parties that we needed time to deliberate and that we would deliver our decision on a later date of which parties would be informed. We now deliver our decision, which is a split decision. My learned sisters Justice Zaharah bt Ibrahim and Justice Umi Kalthum bt Abd Majid, and my learned brother Justice Abdul Aziz bin Abdul Rahim, had occasion to read my draft judgment and they had agreed to adopt the same as their judgment in this appeal. My learned brother Justice Azahar bin Mohamed has indicated that he has, with respect, a dissenting decision. So this is a majority judgement.

THE ISSUES ON APPEAL

Applicability of presumption of illegal property under s 35 to a proceedings under s 32(3)

[40] The crucial issues that needed our consideration have been first, whether, in the scheme of things under the FOP Act, s 35 therein applies to proceedings that are undertaken under s 32(3) of the said FOP Act. And

second, whether on the evidence adduced by the appellants, the forfeiture order and its reach over the seized properties, as ordered by the courts below, was justified.

[41] For ease of reference, we now set-out the relevant statutory provisions as contained in the two said sections which are now under scrutiny.

[42] Section 35 reads as follows:

> Where any proceedings under this Act are brought against any person or in respect of any property on the ground that such person is a liable person or that such property is illegal property, the court shall presume that person to be a liable person and that property to be illegal property, unless the person proceeded against proves to the contrary by admissible evidence and where he adduces any such evidence, the Public Prosecutor shall have the right to rebut the same.

[43] The relevant provision under s 32(3) read as follows:

> The Sessions Court to which a claim is referred under subsection (2) shall issue a summons requiring the person claiming that he is lawfully entitled to the property, and the person from whom it was seized, if he and his whereabouts are known, to appear before the court and upon such appearance or in default of such appearance, upon due service of such summons being proved, the Sessions Court shall proceed to the examination of the matter and if satisfied that no offence under this Act or under the Dangerous Drugs Act 1952 has been committed in respect of the property claimed and that such property is not illegal property, shall order the same to be released to the person claiming the same upon proof that he is lawfully entitled thereto, and shall, in any other case, order the property to be forfeited.

From the above, it is clear that the sessions court shall release the claimed property to the claimant, if it is satisfied that:

(a) no offence under this Act or under the Dangerous Drugs Act 1952 has been committed in respect of the property claimed; and

(b) such property is not illegal property; and

(c) the person claiming the property proves that he is lawfully entitled to the property.

The parties' positions

[44] We had occasion to consider the able submissions, written and oral, by both the parties.

[45] The appellants' position has been that the provisions as contained in s 35 of the FOP Act do not apply in aid of the prosecution in a proceeding

under s 32(3) of the FOP Act, by way of invocation of the presumption of illegal property over the seized properties being the subject matter of the claims by the three appellants.

[46] It was argued on behalf of the appellants that s 35 of the FOP Act that provides for presumptions ought not to apply in the context of s 32(3) of the FOP Act proceedings. The long and short of that contention has been that the presumptions that are provided in s 35 only would apply in any proceedings under the FOP Act in either of the following circumstances, namely: (a) against any person on the ground that the person is a liable person; or (b) in respect of any property that such property is illegal property. The proceedings in (a) refers to a prosecution against a liable person while the proceedings in (b) refers to a forfeiture proceedings against the seized property.

[47] Therefore, the appellants had read the phrase 'any proceedings' contained under s 35 as being more circumscribed on account of the ensuing phrase, namely, 'are brought against any person or in respect of any property on the ground that such person is a liable person or that such property is illegal property ...'. Learned counsel contended that the latter phrase has the effect of limiting the reach of the net which the Legislature has sought to cast in relation to the applicability of the presumptions contained therein. The appellants had, through learned counsel cited, among others the decision of learned justice Vincent Ng J (as he then was) in the case of *Tang Kheng Teong & Anor v Public Prosecutor* [1992] 2 MLJ 489; [1992] 3 CLJ Rep 6723 where he had said:

> Indeed the wording of s 35 of the Act which section appears to be the very linchpin of the *Public Prosecutor*'s case for supporting the summary manner in which proceedings for forfeiture are to be dealt with by the sessions court — clearly states that *the presumption that the claimant is a liable person and that the property to be illegal property' arises only where the proceedings under the Act are brought 'on the ground that such person is a liable person or that such property is illegal property'*. (Emphasis added.)

[48] On the other hand, the prosecution's stance has been the exact opposite. It had read s 35 as all-encompassing, by it reading the phrase 'any proceedings under this Act' under s 2 of the FOP Act as the operative phrase.

[49] The position advocated by the learned deputy has been that the presumptions under s 35 of the FOP must be applicable to all proceedings under the FOP Act. Support for that position has been based on a wide interpretation of the phrase 'any proceedings' that appears under s 35 of the FOP Act. A reference was made to the definition of the phrase 'proceedings under this Act' as contained under s 2 of the FOP Act. Section 2 has defined that phrase to mean 'any proceedings under any provision of this Act, including any prosecution for an offence under this Act'. Premised upon this

definition, the learned deputy had submitted before us that 'every action taken in this Act and every action taken at any stage constitutes 'proceedings under this Act'.' He had gone on to submit, as can be seen in his written submissions headed 'Ringkasan Hujahan (2) Pihak Responden' at p 5 therein, like so:

> The word 'including' in the interpretation enlarges the scope and meaning of the words 'proceedings under this Act' to include any prosecution for an offence under this Act. The expression 'including' is very generally used in interpreting clauses in the order to enlarge the meaning of words or phrases occurring in the body of Statute; when it is so used, these words or phrases must be construed as comprehending not only such things as they signify according to their natural import, but also those things which the interpretation clauses declares, that they shall include. The word 'including', therefore, is a term of extension. It imports addition. It adds to the subject matter already comprised in the definition. It would, therefore, include proceedings under section 7 of the Act, in particular section 7(4)(b). As such, it would include too any action taken against any person or in respect of any property on the ground that such person or that such property is illegal property, for example, by the Public Prosecutor taking up the role of a 'forwarding agent' under section 32(2) would constitute 'proceedings under this Act'.

[50] The above quoted paragraph would, it appears, represent the core rationale for the stance taken by the public prosecutor, with regard to the contentious issue before us, on the application of s 35 in a s 32(3) proceedings. We will return to address this argument later on in this judgment.

[51] As was expected, in the course of submissions before us, both learned counsel had brought our attention to the existence of two decisions of this court on this matter, which have since presented conflicting views on this issue on the applicability of the stated presumptions under s 35, in particular the presumption on illegal property, to proceedings under s 32(3) of the FOP Act. As such, it is now opportune to look closely at those two important decisions. The two decisions are namely, *Cherian a/l KC George & Anor v Public Prosecutor* [2012] 4 MLJ 537; [2012] 6 CLJ 17 ('the *Cherian*'s case') and the case of *Public Prosecutor v Lim Kim Hoei & Anor* [2014] 3 MLJ 534; [2014] 4 CLJ 816 ('the *Lim Kim Hoei*'s case').

[52] While learned counsel for the appellants had relied heavily on the decision of this court in the *Lim Kim Hoei*'s case the learned deputy had submitted before us that this court's decision in the *Cherian*'s case ought to be the preferred view on what is the law on the matter presently under scrutiny.

[53] The reasons for the learned deputy to have said that, is basically two-fold. First, the phrase 'any proceedings' in s 35 of the FOP Act must include a proceeding under s 32(3) of the FOP Act. Second, the decision in the

Lim Kim Hoei's case does not promote the purpose or object of the FOP Act as opposed to the decision in the *Cherian*'s case.

[54] Suffice to say that learned counsel for the appellants had submitted otherwise.

[55] The facts of the case in the *Lim Kim Hoei*'s case as appear in the report are as follows:

> The respondents were husband and wife. The first respondent was arrested by the police for investigation under s 3(1) of the Dangerous Drugs (Special Preventive Measures) Act 1985 ('the SPM Act') in relation to suspected trafficking of dangerous drugs. On the same day of the arrest, the police seized two cars, some cash and two mobile phones ('the properties') under s 25(1) of the Dangerous Drugs (Forfeiture of Property) Act 1988 ('the Act') from the respondents' home on the ground that the police had reason to believe that these properties constituted illegal properties under the Act. The first respondent was subsequently placed under restricted residence pursuant to the Prevention of Crime Act 1959. The respondents subsequently applied under s 32(2) of the Act for all the properties to be released to them on the ground that they were lawfully entitled to those properties. In accordance with the requirements of s 32(2), the public prosecutor referred the respondents' claim to the sessions court for decision. The sessions court judge held that the respondents had failed to rebut the presumptions under s 35 of the Act to entitle the release of the properties to them. Accordingly, he ordered the properties to be forfeited to the government. The respondents' appeal to the High Court against the decision of the sessions court was allowed. Hence, this appeal by the prosecution. The main issues which arose for determination were: (i) whether in a claim made under s 32(2) of the Act for the return of any property seized by the police under Part IV of the Act, the presumptions in s 35 that the property shall be deemed to be illegal property shall apply; (ii) whether the respondents were entitled to the properties.

[56] As is clear, the significance of this *Lim Kim Hoie*'s case resides not so much on its factual matrix, but rather in the court's interpretation of the applicability of the presumptions as contained under s 35 of the FOP Act to proceedings under s 32(3) of the FOP Act. The sting of the decision in that *Lim Kim Hoie*'s case was captured in para 36 of the judgment of the court, where it reads:

> [36] While it is not disputed that any property seized under this Act may be forfeited if they fall within the circumstances stated in s 32(1), however, it is our view that, unlike a forfeiture proceedings under Part III, the presumptions under s 35 of the Act do not apply to a claim made under s 32(2) for the release of such property. This is because under s 32 no proceedings is brought against any person or in respect of any property on the ground that such a person is a liable person or that such property is illegal property. Instead, s 32(2) relates to a claim made by a person in respect of any property seized by the police pursuant to Part IV of the Act for which, (i) no prosecution for any offence under any law is instituted with regard to

such property; and (ii) no forfeiture proceedings are commenced by the public prosecutor for the forfeiture of such property under Part III.

[57] The learned deputy had submitted before us that 'the elucidation' of the law in that para 36 in the *Lim Kim Hoei*'s case was 'inaccurate'. The learned deputy had further submitted before us that although the learned appeal justices in the *Lim Kim Hoei*'s case had addressed their minds to the purpose and objective of the FOP Act as to its Legislative origin and intent, it was submitted further by the learned deputy that they had actually only paid lip-service to such consideration and ignored the provisions under s 34 of the FOP Act itself. For ease of reference, s 34 which provides for the construction and interpretation of the FOP Act, states as follows:

> Construction and interpretation of this Act
>
> 34 In any proceedings under this Act the provisions of this Act shall be construed and interpreted so as to give effect to the purposes of this Act without regard for ambiguities, or infirmities of language, or other defects or deficiencies therein, or to objections which are trivial in nature or *which do not affect the merits or the substance of the issues before the court*. (Emphasis added.)

[58] In not so many words, the learned deputy had submitted that the Court of Appeal in the *Lim Kim Hoei*'s case had erred in law in arriving at its decision in concluding as it did, namely that the presumption of illegal property ought not to apply to the seized property that was the subject matter of a claim by a person/the claimant under s 32(3) of the FOP Act.

[59] Let us now look at the situation in the *Cherian*'s case, but before we go there, we would like to look at some of the cases cited by the learned deputy in his written submissions which had made pronouncements on the effect of s 35 of the FOP. One of the earlier cases that had made a ruling on the inter-play between ss 35 and 32(3) of the FOP has been the case of *Public Finance Bhd v Public Prosecutor* [1999] 4 MLJ 143; [1999] 8 CLJ 485 where the learned judge there had held that '... the proceedings under s 32(3) is a proceeding within the meaning of 'any proceedings' in respect of any illegal property under s 35 of the Act.' In respect of this contention, the learned deputy had submitted before us that as such the presumption of illegal property must be invoked against the property in the s 32(3) proceedings and went on to submit that:

> Malahan jika dilihat s 35 memperuntukkan 'against proves to the contrary by admissible evidence' dan s 32(3) juga memperuntukkan perkara yang sama iaitu 'upon proof that he is lawfully entitled thereto.'

[60] At this juncture, suffice for us to say that those two phrases differ in substance and material particulars in relation to the burden of proof that pertains to each of the situations that was adverted to. We note that the former

phrase has its origin under s 35 while the latter phrase has its origin from s 32(3) of the FOP Act. Clearly, ex facie, they do not provide for the same nature of evidential proof. While the former phrase is a consequence of a statutory presumption, where the nature of the evidence that is required from the liable person is in the nature of rebuttal evidence, the latter phrase requires affirmative proof coming from the claimant that he is lawfully entitled to the property, in the course of proving which he has to lead affirmative evidence to satisfy the sessions court judge that the property that is being claimed by him is not illegal property. Therefore, there is no clear intention that could be derived from the wordings under s 32(3) that in order to prove that the property is lawfully his, the claimant is also required to prove a negative, in that the property was not illegal property. The burden on the claimant to satisfy the sessions court is one that is on the balance of probabilities and if the sessions court is not persuaded by the claimant's proof that would mean that the claimant has failed to discharge the onus on him and the sessions court must then order that the seized property be forfeited to the government revenue.

[61] In the scheme of things that pertains to proceedings under s 32(3) of the FOP Act, we are of the view that it would be too tenuous to agree with the submissions put forth by the learned deputy that by the public prosecutor playing the role of a forwarding agent in referring the claim to the sessions court, it is tantamount to saying that the public prosecutor is in fact taking action against the said property and on account of that, the presumption of it being illegal property under s 35 must therefore be invoked and becomes in play in the s 32(3) proceedings and which the claimant has to rebut on the balance of probabilities. To our mind, the burden on the claimant to prove his claim over the property in a proceeding under s 32(3) remains the same, namely one that is on the balance of probabilities, but that burden arises from him having to fulfill the requirement as stated in the phrase 'upon proof that he is lawfully entitled thereto' and not pursuant to the need to 'prove(s) to the contrary by admissible evidence'. The latter phrase only befalls the person in a proceeding where a presumption applies but the claimant under s 32(3) proceedings does not bear the burden of having to rebut the presumption of illegal property against the seized property on the balance of probabilities.

[62] The other case cited in submission by the learned deputy has been the case of *Public Prosecutor v Tan Lee Kok* [1998] 2 MLJ 65; [1998] 2 CLJ 286 ('the *Tan Lee Kok*'s case) whereby it was contended that the burden lies with the claimant to prove his claim under s 32(3) of the FOP Act, in that he was the person lawfully entitled to the property. The court in the *Tan Lee Kok*'s case had said among others:

> Section 32(3) places the burden upon the person making the claim 'upon proof that he is lawfully entitled thereto'. Section 32 therefore places no burden on the public prosecutor to prove anything. It merely places the burden to refer the claim to the

> sessions court. Therefore under s 32, the role of the public prosecutor is merely to forward the claim as has been well put by the deputy public prosecutor, the role of the public prosecutor is that of a 'forwarding agent'.

[63] In fact, the relevant passage in the *Tan Lee Kok*'s case that was cited to us ended with the following sentence: '... whereas under s 32, the burden would be on the claimant who asserts that he is lawfully entitled to the property.' With respect, there is nothing in there to suggest that the claimant, in the course of proving his claim over the property under s 32(3) would also have to rebut the presumption of 'illegal property' which resides under s 35 of the FOP Act.

[64] From a perusal of s 32(3) of the FOP Act, to our mind, it has set-out the procedure to be followed by both the parties involved. The *Tan Lee Kok*'s case is clear on that score. While the role of the public prosecutor is limited to that as a 'forwarding agent', the role of the claimant has also been explained, namely that he has to prove that he is lawfully entitled to the property that is the subject matter of the proceedings. In fact, the court in the *Tan Lee Kok*'s case summarised the procedure rather neatly when it said:

> In fact, the procedure both ss 8 and 32 is consistent with s 101 of the Evidence Act 1950, which provides that the burden is on the person who asserts a thing. Under s 8, since it is the public prosecutor who asserts that the property ought to be forfeited, the burden is therefore, on him, whereas under s 32, the burden would be on the claimant who asserts that he is lawfully entitled to the property.

[65] To our mind, s 32(3) of the FOP Act is self-contained regime that specifically pertains to a claim made by a person in respect of a property which is not the subject matter of any prosecution nor of forfeiture proceedings. With respect, we agree with the decision of this court in the *Tan Lee Kok*'s case and we wish to add that in a case where the public prosecutor institutes prosecution or forfeiture proceedings under the FOP Act, the 'legal aid' comes in the form of s 35 to assist him by providing the presumptions as contained therein. But not in proceedings under s 32(3) of the same FOP Act. While acknowledging that all provisions in the FOP Act must be considered by having due regard to the other provisions housed in the same statute, it must be interpreted harmoniously so as to maintain the integrity of its framework, by giving effect to what Parliament had intended to provide for in the various regimes created within the FOP Act. We took note that the FOP Act has created three separate regimes where separate set procedures are provided for each one of them, namely the prosecution of offences regime, the forfeiture of illegal properties regime, and the proceedings that are being housed under s 32(3) pertaining to the claim by a person over a property which he claims to be its lawful owner. Taken in that sense, with respect, ss 35 and 32(3) of the FOP Act are, in fact and in law, mutually exclusive.

[66] We are fortified in our conclusion because s 2 of the FOP Act has been couched in the following manner: 'In this Act, unless the context otherwise requires, ...'. That qualification clearly, to our mind, subjects the ensuing definitions to the context in which they appear in the provisions under the FOP Act. In order words, there is a caveat thrown in and in our opinion that is a huge caveat as it is intended for the provisions to be read in the proper perspective in which they appear in the Act. To our mind, to hold that the phrase 'proceedings under this Act' as defined in s 2 and as appears in s 35 applies wholesale to s 32(3) would militate, against the clear words of s 35 where clearly the context of s 35 deals with proceedings 'against any person or in respect of any property on the ground that such person is a liable person or that such property is illegal property' *by the prosecution*. It cannot therefore apply in proceedings where a person claims for the return of property which he claims to be lawfully his. An interpretation that confers an overarching and *carte blanche* effect to the phrase 'any proceedings under the Act' as contended by the learned deputy would involve an exercise that totally ignores the caveat, to wit, 'unless the context otherwise requires' that appears conspicuously in the opening words in s 2 of the FOP Act.

[67] We now find it opportune, while addressing the effect of s 2 of the FOP Act, to address the argument put forth by the learned deputy in his written submissions on the effect of the use of the word 'including' in the definition of the phrase 'proceedings under this Act'. To recapitulate, the argument on that point had gone as follows: 'The word 'including', therefore, is a term of extension. It imports addition. It adds to the subject matter already comprised in the definition. It would, therefore, include proceedings under s 7 of the Act, in particular s 7(4)(b). As such, it would include too any action taken against any person or in respect of any property on the ground that such person or that such property is illegal property, for example, by the public prosecutor taking up the role of a 'forwarding agent' under s 32(2) would constitute 'proceedings under this Act'.'

[68] With respect, the use of the word 'including' to bring in the action of the prosecution of offences as part of the meaning of 'proceedings' does not necessarily mean that the definition becomes one that is 'extending' in nature. Rather, the inclusion of the prosecution action is to dispel any doubt that a prosecution action is a proceeding under the FOP Act. Such doubt may arise in view of the fact that the FOP Act is basically and essentially a statute specifically enacted to provide for the forfeiture of properties connected with activity related to offences under the FOP Act and the Dangerous Drugs Act 1952 or any foreign law corresponding to these two Acts, as stated in the long title of the FOP Act. Hence 'proceedings' may be interpreted to mean purely such forfeiture proceedings, unless clarified. To our mind, the use of the word 'including' therefore does not extend the ambit of the word 'proceedings', but

is intended to provide such clarification. Having looked closely at how the provisions of s 35 are couched, we are of the view that in context, the presumptive provision of illegal property would not, with respect, extend into the realm of a proceeding undertaken under s 32(3) of the FOP Act.

[69] Now, we revert back to the decision in the *Cherian*'s case which according to the submissions by the learned deputy ought to be the preferred view pertaining to the relationship between s 35 and s 32(3) of the FOP Act.

[70] Briefly, the facts in that case had involved the forfeiture of property seized from the two appellants who had been arrested and subsequently detained under the Dangerous Drugs (Special Preventive Measures) Act 1985. The appellants then applied under s 32(3) of the FOP Act for the release of the seized property to them. The sessions court dismissed their application. On appeal to the High Court, the learned judge had allowed partial release of the property to the appellants. The appellants had then appealed to the Court of Appeal, where it was complained before the learned appeal justices that the High Court judge was wrong in holding that the appellants had failed to rebut the presumption under s 35 of the FOP Act, ie, that the properties were illegally acquired. It was argued before the Court of Appeal that the presumption under s 35 did not apply in a proceeding under s 32(3) of the FOP Act. The learned appeal justices did not agree with the contention put forth by the appellants' learned counsel and decided in Held (1) as follows:

> (1) The presumption under s 35 of the Act is applicable to a proceeding under s 32 of the Act. The wordings in s 35 are very clear wherein it uses the words 'any proceedings' which must be given the ordinary meaning that it covers all proceedings under the Act. To say that a proceeding under s 32(3) of the Act is not a proceeding that is envisaged under s 35 of the Act would not be in tandem with the intention of the law makers and would be in violation to the clear wordings of s 35 of the Act (see para 21).

[71] The basis on which the learned justices in the *Cherian*'s case had come to its conclusion can be seen at para 21 in its judgment, thus:

> [21] With respect, we are more inclined to agree with the majority of the High Court judges which have held that the presumption under s 35 of the Act is applicable to a proceeding under s 32 of the Act. We share the view that s 35 was intended to apply to all proceedings under the Act. The wordings in s 35 are very clear. It uses the words 'any proceeding'. The words 'any proceedings' should and must be given the ordinary meaning that it covers all proceedings under the Act. To say that a proceeding under s 32(3) of the Act is not a proceeding that is envisaged under s 35 of the Act and would not be in tandem with the intention of law makers and would be in violation to the clear wordings of s 35 of the Act.

THIS COURT'S FINDING

[72] From a perusal of the arguments that had been canvassed before us, we are of the view that the position propounded by the appellants' learned counsel ought to prevail.

[73] The provisions of s 32 of the FOP allow any person to stake a claim over a property that was seized by the police within three months of its seizure. To our mind, the gist of the matter is, as a claimant, he will have to prove his claim on the balance of probabilities, just like any person in a civil case who wants judgment to be entered in his favour by the court. That burden is shouldered by the claimant under s 32(3) not because the presumption under s 35 applies to the proceeding under s 32(3), but because he has to prove his case in order that the court is satisfied and gives judgement in his favour. Again the case of *Tan Lee Kok* is an authority on point.

[74] We find that the decision of this court in the *Lim Kim Hoei*'s case encapsulates the essence of our view when it states in para 36 of its judgment, as follows, at p 549 (MLJ); p 832 (CLJ):

> [36] While it is not disputed that any property seized under this Act may be forfeited if they fall within the circumstances stated in s 32(1), however, it is our view that, unlike a forfeiture proceedings under Part III, the presumptions under s 35 of the Act do not apply to a claim made under s 32(2) for the release of such property. This is because under s 32 no proceedings is brought against any person or in respect of any property on the ground that such a person is a liable person or that such property is illegal property. Instead, s 32(2) relates to a claim made by a person in respect of any property seized by the police pursuant to Part IV of the Act for which, (i) no prosecution for any offence under any law is instituted with regard to such property; and (ii) no forfeiture proceedings are commenced by the public prosecutor for the forfeiture of such property under Part III.

With respect, from our reading of s 32 of the FOP Act the forfeiture of the seized property crystalises, not because there has been an affirmative application by the public prosecutor against the property for it to be forfeited, but rather, through effluxion of time where there is no claim over the property by any person under circumstances mentioned under s 32(1), namely by operation of law, or where the sessions court is not satisfied that the person claiming under s 32(3) has successfully proven that he is the person who is lawfully entitled to the seized property and that he has failed to show to the court that the property was not illegal property. At the risk of being repetitive, his burden to affirmatively prove that the property is not illegal property, does not arise from the invocation of the presumption of illegal property that is housed under s 35 of the FOP Act.

[75] In para 38 of the *Lim Kim Hoei*'s judgment, it is stated:

> [38] Bearing in mind that since s 32(3) are not forfeiture proceedings under this Act, the question of the property claimed being presumed to be an illegal property under s 35, unless it is proved to the contrary by the respondents, does not arise at all. The only burden of the respondents is to adduce sufficient credible evidence that the properties were acquired by them through lawful means and that they were lawfully entitled to such properties.

[76] As to the requirements to satisfy the examining court regarding the elements that there was no offence under the FOP Act or the Dangerous Drugs Act 1952 having been committed in respect of the said property that is being claimed and that such property is not illegal property, such evidence must come from the investigating officer as he is the person in possession of the required information and knowledge about those issues. The sessions court judge may want to call the investigating officer in order to satisfy himself of the two elements, if he is not already satisfied by the mere fact that the reference of the case is one that is made by the public prosecutor himself. Again, we agree with the learned justices' view on this as expressed in the *Lim Kim Hoei*'s case in para 39 of their judgment.

[77] Of course *Lim Kim Hoei*'s case is the latest Court of Appeal decision that ruled on the inter-play of these two sections under the FOP Act. In that case, the Court of Appeal having addressed the *Cherian*'s case it had made the following observations:

> [19] With respect, we have a different view. We believed the court in *Cherian* did not have the benefit of full blown arguments, such as are now before us. It was also not brought to the attention of the panel in *Cherian* that the decision of the High Court in *Hong Leong Bank Bhd* was upheld by the Court of Appeal. The Court of Appeal in *Cherian* was also not informed by counsel appearing before it that *Hong Leong Bank Bhd* was followed by the High Court of Kuching in the unreported judgment of the Sibu High Court in Case No Sibu-42 of 2010 *Public Prosecutor v Tiong Sii Chong*.
>
> [20] In our opinion, had the issues and the case law authorities been fully ventilated before the panel in *Cherian*, the panel then would probably have come to a different conclusion.

[78] We are aware that this sitting of five judges was empanelled to resolve the apparent conflict that now exists pursuant to the two decisions emanating from this court in the *Cherian*'s case and the *Lim Kim Hoei*'s case. At the end of that exercise, as a court of coordinate jurisdiction, this court is at liberty to choose which of the conflicting decisions to follow regardless of their relative age. This is one of the three exceptions to the general rule that the Court of Appeal is bound by its own decisions, as adumbrated in the case of *Young v Bristol Aeroplane Co Ltd* [1944] KB 718 (CA). This forms an integral part of the larger and crucial principle of stare decisis.

CONCLUSION ON THE APPLICABILITY OF THE PRESUMPTIONS

[79] As such, we are of the respectful view that the decision of this court in the *Lim Kim Hoei*'s case is the preferred view because, as was alluded to above, it is the proper and correct view of the law in determining whether the presumption of illegal property shall apply in a proceeding under s 32(3) of the FOP Act. There is no ambiguity in the language employed under s 35 of the FOP Act. It means what it says.

[80] Section 34 of the FOP Act, to which our attention was directed by the learned deputy, would not apply to this case as this involved the very substance of the issue that was brought before this court for our consideration. It is not a matter that could be treated as trivial.

[81] We feel the need to address this matter as it was the argument of the learned deputy that the decision *Lim Kim Hoei*'s case did not promote the objective and intention of the FOP Act. It was said to have given just lip-service in that direction. To our mind, if one were to look at the long title of the FOP Act itself, it would become clear that the FOP Act was not just about forfeiting *any* property. What it does target is property that is ill-gotten, in contravention of the provisions under the FOP Act as well as the Dangerous Drugs Act 1952 and indeed provisions under corresponding foreign laws. In order to enable that forfeiture and the vesting of the seized property, the FOP Act was enacted under art 149 of the Federal Constitution, because otherwise that forfeiture and vesting would run afoul of art 13(2) of the Federal Constitution which provides that, 'No law shall provide for the compulsory acquisition or use of property without adequate compensation.'

[82] As the FOP Act is a special law enacted under art 149 of the Federal Constitution, which makes forfeiture of private property and its vesting in the government valid despite the fundamental rights provided for in art 13, it has to be interpreted such that the legitimate and recognised rights of persons such as those provided for under s 32(3) of the FOP Act are not compromised. The integrity of the Legislative framework with its various regimes has to be maintained. In that sense the provisions have to be interpreted in such a manner as to create and maintain harmony in the inter-play between its various provisions, inter se.

[83] As such, the short answer to the first issue posed before us, must be that we are in agreement with learned counsel for the appellants in that the presumption of illegality against the property does not apply against a seized property which a claimant seeks to be released to him under s 32(3) of the FOP Act, as being the lawful owner of that property. Proceedings under s 32(3)

comes under a specific regime under the FOP Act to which the presumption of illegal property under s 35 does not apply.

[84] Having ruled that the presumption of illegal property under s 35 does not apply in a proceeding under s 32(3), we will now proceed to consider the second issue, namely whether the seized properties are not illegal properties and that appellants are lawfully entitled thereto. Indeed that issue also forms an integral part of their appeal against the dismissal of their claim over a major portion of the seized properties.

[85] Counsel for the appellants conceded that for a number of the seized properties there was no evidence led by the appellants to prove that the properties are not illegal properties and that the appellants are lawfully entitled to them.

[86] In our view, as the burden of such proof is on the appellants, the admitted absence of such evidence means that that burden has not been discharged by the appellants. The sessions court was therefore correct in refusing to order the release of such properties to the appellants.

[87] In the circumstances, we shall now only deal with those properties in respect of which sufficient evidence was led to prove that the properties are not illegal properties and that the appellants are lawfully entitled thereto. These are the properties in the names of the appellants Chan Swee Ken and Chan Kong Chuan. Therefore, except where otherwise stated, when we refer to the 'appellants' after this, we will be referring to the appellants Chan Swee Ken and Chan Kong Chuan collectively.

[88] There was no suggestion, let alone evidence, that any offence under the Dangerous Drugs Act 1952 had been committed *in respect of the properties in question*. Thus, we need only determine whether the sessions court erred in *not* finding that the properties are *not* illegal properties and that the appellants are lawfully entitled thereto, and consequently whether the High Court was correct in dismissing the appellants' appeal against the sessions court's decision.

THE APPELLANTS' SOURCES OF FUNDS IGNORED BY THE SESSIONS COURT AND THE HIGH COURT

[89] Before we deal with the properties which the sessions court had refused to release to the appellants, we must first state that the learned sessions court judge had completely ignored the income earned by the appellants from the time they began their respective employment until 1992 (a period of 17 and 16 years, respectively) on the basis that most of the properties were purchased since 1995.

[90] There was uncontroverted evidence before the sessions court that Chan Kong Chuan began his history of employment in 1976 and Chan Swee Ken began her employment with Gleneagles Medical Centre in 1975.

[91] We note that even the deputy public prosecutor agreed that this disregard for the income of the two appellants earned prior to 1992 was erroneous.

[92] We further note that the sessions court had undertaken a simple arithmetical approach of adding the employment income of the appellants for the period taken into consideration, and then comparing the resulting sum to the value of the properties acquired by the appellants.

[93] The learned sessions court judge had completely ignored the evidence that the appellant Chan Kong Chuan had received loss of employment cash payment of RM38,172.50 from Roche (M) on 16 April 1990 before subsequently being employed by Atlantic Lab (M) Sdn Bhd in the very next month, Wivahang Enterprise two years later and then YSP Industries (M) Sdn Bhd.

[94] The sessions court also ignored the oral evidence of Chan Kong Chuan that in 1997 he was paid the sum of RM45,000 by Great Eastern Life Insurance Co for a matured policy. He was not able to produce any document to prove that due to the lapse of time between that payment and the proceedings for the release of the properties seized. We see no reason why that evidence should be ignored or rejected, especially since there was no challenge by the prosecution.

[95] The sessions court had completely ignored the gains that could be reasonably be obtained by the appellants through shrewd and careful investments of their employment income and their other legitimate sources of income.

[96] We find it quite unfortunate that despite the glaring omissions by the sessions court as we mentioned above and as we will address below, the learned High Court judge in His Lordship's judgment said:

> Saya mendapati HMS telah membuat penilaian yang detail, adil dan saksama sebelum mencapai keputusannya untuk melucutkan harta-harta tersebut kepada kerajaan.
>
> ...
>
> Kesimpulannya, saya tidak bercadang untuk mencampuri keputusan HMS dan perintahnya untuk melucutkan harta-harta tersebut adalah dikekalkan. ...

A PROPERTIES IN RESPECT OF WHICH EVIDENCE WAS ADDUCED BUT RELEASE WAS REFUSED

[97] We shall now deal with the seized properties which the sessions court had refused to release to the appellants but in respect of which, in our opinion, there was sufficient evidence adduced before the sessions court to warrant their release to the appellants. These are immovable properties identified as Items E38 and E39 and movable properties identified as Items E26, E27, E29 and E36.

Property E38 — the 'Putera Place Condominium' (condominium bearing the address 118-B4-16 Parcel No 5, Putera Place Condominium, Persiaran Bayan Indah, Bayan Lepas, Pulau Pinang)

[98] The appellant Chan Swee Ken in her witness statement and oral evidence explained that the Putera Place Apartment was purchased jointly with her husband, the appellant Chan Kong Chuan, at the price of RM340,000. Unfortunately, according to Chan Kong Chuan in his witness statement, the sale and purchase agreement was taken by one Inspector Muthu in the course of the seizure of the properties.

[99] However, from the appellants' facility agreement with Maybank, it appears that the Putera Place Apartment was purchased under a sale and purchase agreement dated 18 September 2003. They obtained a loan of RM150,000 towards the purchase price.

[100] The appellants claimed to have paid for the difference in terms of the progress payments from their savings.

[101] By the time of the purchase of the Putera Place Condominium, each of the appellants had become the owner of a condominium unit at Persiaran Sg Emas, Feringgi Delima Condominiums, Batu Feringgi ('the Feringgi Condominiums'). The Feringgi Condominiums were seized but released to the appellants. As the Feringgi Condominiums were purchased in 1995 and remained in the appellants' ownership/possession until these proceedings, we find it strange that no one thought it fit to inquire if the Feringgi Condominiums were providing income to the appellants, which would explain their continued ownership/possession of the condominiums.

[102] From the addresses in the documents in the record of appeal it is quite obvious that the appellants and their sons resided at the Gold Coast Apartment.

[103] It is not unreasonable to conclude that the Feringgi Condominiums have been retained because they provide income to the appellants. This was never considered by the courts below.

[104] There was also evidence that on 11 March 2004, a few months after the sale and purchase agreement was signed, Chan Swee Ken withdrew the sum of RM26,375.50 from her EPF account, which she was entitled to do upon reaching the age of 50.

[105] By 2006 (barely three years after the sale and purchase agreement was signed), Chan Swee Ken became the recipient of her share in the sale of her family property in Alor Star. This fact was completely ignored by the sessions court and High Court. She gained RM103,888.89 from that sale which was made under a sale and purchase agreement dated 10 October 2006. According to the appellants, that money was then used towards settling the Maybank loan.

[106] We do not find anything inherently improbable in the explanation given by the appellants as to how they were able to financially manage to acquire the Putera Place Condominium. In the absence of any evidence to the contrary, it is our view that the sessions court and the High Court ought to have found that the appellants had succeeded in proving, on the balance of probabilities, that the Putera Place Condominium is not an illegal property and that they are lawfully entitled to the property.

Property E39 — the 'Gold Coast Apartment' (apartment bearing the address 109-2-5, Gold Coast Resort, Persiaran Bayan Indah, Bayan Lepas)

[107] The sales and purchase agreement (D4) dated 18 March 1997 shows that the Gold Coast Apartment was purchased from the developer Techware Sdn Bhd by the appellants. It was then yet to be built.

[108] Chan Swee Ken explained that they took a loan for RM100,000 from Ban Hin Lee Bank. This evidence is supported by the letter dated 24 May 1997 from Ban Hin Lee. As can be seen from that letter, the appellants needed to only service the interest payments while the apartment building was being constructed. The actual instalments, as in the usual practice, would only commence when the final amount was disbursed.

[109] As a condition for the drawdown of the loan, the appellants must show that they could pay the difference between the purchase price and the loan. There is nothing to suggest that such difference (which would include the 10%

deposit) was unlawfully sourced. The appellants in their evidence stated that they used their savings as well as EPF withdrawal from Chan Swee Ken's account.

[110] It has to be borne in mind that by that time the appellants entered into the sale and purchase agreement for the Gold Coast Apartment, they had been working for at least 21 years. It is reasonable to expect that they would have had sufficient savings.

[111] The exh D6 shows that on 15 July 1997 Chan Swee Ken withdrew RM42,302.80 from her EPF account towards the purchase of a non-low cost house.

[112] The appellants had then to service the housing loan from Ban Hin Lee Bank in the form of 180 monthly instalments of RM1,094 a month.

[113] It was Chan Swee Ken's evidence that a few years later, by a sale and purchase agreement dated 28 August 2003, Chan Kong Chuan sold his apartment in Taman Kosas for RM110,000 and the proceeds of that sale were used to pay Ban Hin Lee Bank towards settling the housing loan taken for the Gold Coast Apartment.

[114] There was no evidence adduced by the prosecution to challenge the explanation given by the appellants as to the financial arrangements which enabled them to purchase the Gold Coast Apartment, or as to the lawfulness of those arrangements and transactions.

[115] We are therefore satisfied that the appellants had proved on the balance of probabilities that the Gold Coast Apartment is not illegal property and that the appellants are lawfully entitled to it.

Property E26: RM23,067.05 in HSBC Premier Account No 371243353028.

Property E27: RM53,778.96 in HSBC Fixed Deposit Account No 371243353131

[116] The learned sessions court judge dealt with the money in these accounts together with monies in several other accounts (seized Properties E25, E28, and E35) and made the sweeping conclusions that no statement of accounts was produced nor any effort made by the appellants to produce the statements for the prosecution's cross-examination.

[117] This is clearly in error as about 176 pages of statements and documents relating to the HSBC Accounts were produced in court. The appellants cannot

possibly be faulted if the prosecution chose not to cross-examine them on those documents and certainly cannot possibly be faulted if the learned sessions court judge (and the learned High Court judge) chose to completely ignore those 176 pages of documents.

[118] Even more strange is the statement by the learned sessions court judge that the appellant's evidence of having received funds from the sale of their house in Butterworth and which funds were deposited in the accounts 'menimbulkan keraguan kepada mahkamah' due to the alleged non-production of the statements as mentioned above.

[119] The learned sessions court judge totally ignored exhs D50A and D50B which clearly show that the appellants sold in 2005 the land in Butterworth for RM200,000. The memorandum of transfer was presented in January 2005. The appellants appear from the land search in D50B to have been the registered owner since 1992.

[120] The proceeds from the sale would have clearly explained the deposit of RM100,000 into the demand Deposit Account No 371243353028 (E26) and another RM100,000 (broken into blocks of RM25,000 each) in Investment Accounts No 371243353131 (E27) as well as 371243353133, 371243353134 and 371243353135.

[121] Had the learned sessions court judge (and on appeal the learned High Court judge) taken the trouble to examine the HSBC accounts statements, it would be seen that the appellants had, even as at November 1997, been maintaining time deposit accounts (or fixed deposit accounts) with HSBC under three separate numbers, but all consolidated into one statement together with the demand deposit account. The amounts in those accounts appear to have been rolled over every time the time period for the deposit ended. This would explain the increasing amounts in the accounts over several years.

[122] In the circumstances, we are satisfied that the learned sessions court judge and the learned High Court judge erred in not finding that the appellants had proved, on the balance of probabilities that the money in Account 371243353028 (E26) and 371243353131 (E27) was not illegal property and that the appellants were lawfully entitled to the money.

Property E29: money in Public Mutual Gold Account No 443408611 (Public Select Bond — RM221,624.96)

[123] The learned sessions court judge concluded that the monies in Account No 443408611 could not possibly have come from the EPF by comparing two

documents, namely, D63(G) and D63(H), and due to the failure of the appellants to call witnesses from the EPF.

[124] It is unfortunate that the learned sessions court judge — and the High Court judge — did not make the effort to understand the approximately 84 pages of documents and statements of accounts tendered in evidence to show the connection between the money in the account as at the date of seizure and the EPF investment scheme which was the source of the money.

[125] From the documents adduced, it can be clearly seen that in the appellants initially had participated in the EPF investment scheme and invested in two accounts: KL Smallcap (Account No 310134725) and KL Aggressive Growth (Account No 051683569). The two accounts later became renamed as Public Smallcap and Public Aggressive Growth when Kuala Lumpur Mutual Fund Bhd became Public Mutual Bhd.

[126] The documents would also show that the returns from the investment accounts were reinvested in the same investment accounts. Further, there were additional units invested.

[127] The quarterly accounts summary for 30 June 2005 shows that by the quarter ending on that date, the appellant Chan Kong Chuan had also participated in a third investment account under the EPF scheme, namely the Public Dividend Select-KWSP Fund (Account No 390023375). He also had 40,400 units in his own Public Dividend Select Fund (Account No 390190195) with a value of RM9,853.56, and 60,600 units in Public Islamic Balanced Fund (Account No 420215139) with a value of RM14,180.40.

[128] In the final quarter of 2005, a fourth investment account was opened under the EPF Scheme, namely the Public Far-East Select-KWSP Fund (Account No 430021805). At this point in time, the Public Far-East Select-KWSP Fund Account had 96,152 units (with a value of RM22,595.72) while the Public Dividend Select-KWSP Fund Account (No 390023375) had 265,589.74 units (with a value of RM64,777.34).

[129] By the end of the first quarter of 2007, as shown by the quarterly accounts summary as at 31 March 2007, Chan Kong Chuan's Public Far-East Select-KWSP Fund Account (No 430021805) had 515,014.48 units (with a value of RM160,375.51). It can also be seen that by this time the Public Dividend Select-KWSP Fund Account (No 430021805) had only 1,558.27 units. It would appear that there were withdrawals from the latter account which were reinvested in the former together with additional investments.

[130] By this time too, Chan also had his own Public Far East Select Account

(Account No 430409092) with 101,030.33 units, with a value of RM31,460.84. It can also be seen that by the end of the first quarter of 2007, Chan's Public Dividend Select Fund Account (No 390190195) and Public Islamic Balanced Fund Account (No 420215139) had a total of only 2,965.09 units (with a total value of RM885.78. Clearly, he had withdrawn the units and re-invested them in his own Public Far East Select Account (Account No 430409092).

[131] The quarterly accounts summary as at 30 June 2008 shows that by that date Chan Kong Chuan had 684,582.28 units in Public Far-East Select-KWSP (Account No 430021805), and 134,294.41 units in his own Public Far East Select Account (Account No 430409092).

[132] The quarterly accounts summary dated 30 September 2008 shows that on 22 August 2008, all 684,582.28 units in Public Far-East Select-KWSP (Account No 430021805) which at that time had a total value of RM164,573.58, were withdrawn and re-invested in Public Select Bond-KWSP Fund (Account No 443408603). The whole sum of RM164,573.58 from the sale of the units in Account No 430021805 was only able to purchase 169,401.52 units in Public Select Bond.

[133] Chan Kong Chuan had also withdrawn his units in his own Public Far East Select Account (Account No 430409092) and reinvested them in his own account with Public Select Bond Fund (Account No 443408611), gaining 33,231.47 units (with a value of RM32,284.38).

[134] By the end of the third quarter of 2008, as can be seen from the quarterly accounts summary dated 30 September 2008, the appellant Chan Kong Chuan had 169,903.13 units, with a value of RM167,048.76, in his Public Select Bond-KWSP Account (No 443408603).

[135] Chan Kong Chuan's own Public Select Bond Fund Account (No 443408611) had 34,112.84 units as at 30 September 2008 (with a value of RM33,539.74).

[136] Chan Kong Chuan, in his cross-examination, testified that upon reaching the age 55 the EFP would release to the member/contributor the investments in the funds in the joint names of EPF and the member. Chan Kong Chuan attained the age of 55 on 24 November 2008 as he was born on 24 November 1953.

[137] The quarterly accounts summary dated 31 December 2008 shows that on 21 November 2008 all 169,903.14 units in Public Select Bond-KWSP Fund Account No 443408603 were transferred to Chan Kong Chuan's own

Public Select Bond Account No 443408611. These units, together with his own units in Account No 443408611 gave a total of 204,015.97 units.

[138] We are therefore satisfied that Chan Kong Chuan had proved on a balance of probabilities that the units in Public Select Bond Account No 443408611 are not illegal properties and that he is lawfully entitled to them.

Property E36: money in Hong Leong Public Mutual Gold Account No 06277001362 — RM33,975.67.

[139] The learned sessions court judge dealt with this property in the following one confused paragraph:

> Bagi item E36 — Unit Trust Hong Leong Bank No 061-77-001362 berjumlah RM33,975.67 ini, amat jelas juga ianya tidak langsung ada dinyatakan di dalam mana-mana keterangan si penuntut Chan Kong Chuan ini. Jelasnya, tiada sebarang penyata akaun telah dikemukakan olehnya untuk tujuan pembuktian. Atas sebab ini jugalah mahkamah tiada pilihan lain melainkan harus melucuthakkan kepada Kerajaan Malaysia harta ini memandangkan pihak polis juga tidak pernah sama sekali ada menyita akaun Nutrigoal (sumber utama wang daripada Dexchem telah diberikan kepada Chan Kong Chuan tidak pernah disita).

[140] The witness statement of Chan Kong Chuan clearly states in answer to question 49 that he had two portfolios of unit trust investment, one was with Public Mutual and the other with HLG Unit Trust Sdn Bhd. 35 pages of documents and accounts statements were tendered in evidence to explain this account.

[141] We are rather perplexed by the finding of the learned sessions court judge and even more perplexed that the learned High Court judge did not detect the clear error in that finding.

[142] There was a statement from the EPF dated 11 June 1999 (marked D71A) showing that a sum of RM26,000 was allowed to be withdrawn from Chan Kong Chuan's EPF account and invested in HLB Unit Trust Management Bhd on 11 June 1999. That sum of money yielded 260,000 units (at 10 *sen* each). The investment was in the HLB Penny Stock Fund (Account No 0023495) which was later renamed HLG Penny Stock Fund (as seen from D71K dated 15 July 2002).

[143] In October 2003, the appellant Chan Kong Chuan redeemed the units and the resultant amount of RM40,019.50 was paid back into the EPF account on 11 November 2003.

[144] Meanwhile, Chan Kong Chuan had applied to the EPF to invest the sum of RM29,056.94 in HLG Money Market Fund. The withdrawal was approved by EPF. 57,963.18 units were purchased 4 July 2003 using the sum withdrawn.

[145] By letter dated 15 September 2004, Hong Leong Bank Bhd gave notice that Account No 0023495 would have a new number, namely, 06277001362. The HLG Money Market Fund had by now been renamed as HLG Bond Fund-SAP (as can be seen from exh D72D and D72E).

[146] From exh D720, it can be seen that on 5 July 2007, the investment in HLG Bond Fund-SAP was redeemed. At this time Chan Kong Chuan had 102,543.07 units in the fund. The sale yielded a gain of RM55,270.71. Part of this amount, as can be seen from D720, was reinvested in HLG Asia Pacific Infrastructure Fund. 97,323.60 units of that fund were purchased for the sum of RM50,000.

[147] By 19 July 2010, the 97,323.60 units in HLG Asia Pacific Infrastructure Fund in Account No 06277001362 (purchased using monies which can be traced back to the EPF withdrawal in July 2003) had a value of RM33,197.08.

[148] From our examination of the 35 pages of documents and accounts (all of which were marked as exhibits in the sessions court) it is clear that the appellant Chan Kong Chuan had proved on the balance of probabilities that the money in Account No 06277001362 is not illegal property and that he is lawfully entitled to it.

CONCLUSION

[149] We are therefore satisfied that the properties identified as Items E26, E27, E38 and E39 are not illegal properties and that the appellants (husband and wife jointly) are lawfully entitled to them. We are also satisfied that the properties identified as Items E29 and E36 are not illegal properties and that the appellant Chan Kong Chuan is lawfully entitled to them.

[150] In the upshot therefore we allow the appeals in part and order that the properties identified as Items E26, E27, E38 and E39 be released to the appellants and the properties identified as Items E29 and E36 be released to the appellant Chan Kong Chuan.

[151] We order accordingly.

Order accordingly.

Reported by Kohila Nesan